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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 142.

JOSEPH C. SPENCER AND RALPH C. WEBSTER, APPELLANTS,

vs.

SAMUEL McMASTER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF WYOMING.

FILED OCTOBER 21, 1884.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 29, 1887.

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1 Be it remembered that heretofore, to wit, on April 10th, A. D. 1883, there was filed in the supreme court of Wyoming Territory a transcript of record in the words and figures following, to wit:

TERRITORY OF WYOMING, } ss:
County of Laramie, }

In the District Court, First Judicial District. In Chancery.

JOSEPH C. SPENCER and RALPH C. WEBSTER, Complainants,
vs.
SAMUEL MCMASTER, Defendant.

Be it remembered that heretofore, to wit, on the 20th day of March, A. D. 1882, the above-named complainants filed in the office of the clerk and register in chancery of said district court a bill of complaint against said defendant in the words and figures following, to wit:

Bill of Complaint.

TERRITORY OF WYOMING, } ss:
County of Laramie, }

In the District Court for the First Judicial District. In Chancery.

2 JOSEPH C. SPENCER and RALPH C. WEBSTER, Complainants,
vs.
SAMUEL MCMASTER, Defendant.

To the Honorable James B. Sener, presiding judge of the district court for the first judicial district:

Humbly complaining, showeth unto your honor, your orators, the complainants, that they are now, and were at the dates hereinafter mentioned, citizens of the United States; and your orators further show that they are now the owners in possession and lawfully entitled to the possession, and that ever since some time during the year A. D. 1877, they and their grantors and predecessors in interest, under and through whom they claim right and title, have been the owners of and in possession of those certain placer mining claims or petroleum claims situated on Oil Creek, in no formed mining district, in the county and Territory aforesaid, and more particularly described as follows, to wit: The northwest quarter of the
3 northeast quarter and the southwest quarter of the northeast quarter and the west half of the northeast quarter of the northeast quarter and the west half of the southeast quarter of the northeast quarter of section twenty-five, township forty-five north, of range sixty-two west, in the county of Laramie and Terri toryof Wyoming; said petroleum claims containing twenty acres each and located and known as follows, to wit:

"The Discovery claim," "The No. 1 east of Discovery claim," "The Petroleum Springs claim," "The No. 1 north of Discovery claim," "The No. 2 north of Discovery claim," and "The No. 1 west

of Discovery claim," the said claims being more particularly described by the diagram marked Exhibit "A" and attached hereto and made part of this bill of complaint.

And your orators further show that the said locations were made on the public domain of the United States, in full compliance with the laws thereof and with the laws of the Territory of Wyoming, on the certain dates as follows, to wit: "The Discovery claim" on the fifth day of May, A. D. 1880, by Joseph C. Spencer; "The No. 1 east of Discovery claim" on the fifth day of May, A. D. 1880,
4 by George Burroughs; "The Petroleum Springs claim" on the twenty-seventh day of April, A. D. 1881, by Samuel A. Parker; "The No. 1 north of Discovery claim" on the twenty-eighth day of April, A. D. 1881, by Alexander McDonald; "The No. 2 north of Discovery claim" on the twenty-eighth day of April, A. D. 1881, by John McGinnis; "The No. 1 west of Discovery claim," on the twenty-eighth day of April, A. D. 1881, by William Haydon, the said named persons being then and each of them citizens of the United States, and discovered at the dates of the said locations valuable deposits of mineral oil or petroleum, and the certificates of the said locations were by them caused to be duly recorded in the office of the county clerk and *ex officio* register of deeds of the said county of Laramie.

And your orators further show that since the location of the said petroleum claims on the dates aforesaid there have been expended by these complainants and their grantors and predecessors in interest more than one hundred dollars in each and every year in labor and improvements in developing said pretroleum claims above described.

5 And your orators further show that the said defendant claims some right, title, or interest adverse to these complainants in or to the said petroleum claims by virtue of pretended locations of placer mining claims known, according to the survey thereof, as lot No. 37, for which the said defendant, on the thirtieth day of December, A. D. 1881, applied in the United States land office, at Cheyenne, Wyoming Territory, for a patent from the United States, and wrongfully included in said application for patent the said petroleum claims, the property of these complainants; and your orators aver that the said claim of defendant in and to the said petroleum claims above described is without foundation, either in law or in equity, as against these complainants, and that the said defendant has no estate, right, title, or interest in or to said petroleum claims, nor to any part or portion thereof.

And your orators further show that on the twenty-fourth day of February, A. D. 1882, and within sixty days of the first day
6 of publication of defendant's notice of application for patent, they duly filed in said United States land office their adverse claim to the said described placer or petroleum claims so wrongfully included by said defendant in said application for patent, which are more fully shown on said diagram hereunto attached; and your orators further show that this action is brought in support of said adverse claim within the time prescribed by law to determine the

question of the right of possession to the land or claims in controversy herein and to determine the interest claimed by said defendant; and your orators further show that the defendant in his claim to be the owner of the said described petroleum claims, and in his persistency in his said application for patent therefor, although the said complainants are the owners in possession and entitled to the possession of the said described petroleum claims claimed by said defendant, and the defendant having no right or title thereto or interest therein, the said acts and claims of defendant cast a cloud upon the right, title, and interest of said complainants in and
7 to the said described petroleum claims and greatly interfere with and embarrasses complainants in their disposition and quiet enjoyment of said placer or petroleum claims above described.

The said complainants therefore pray as follows:

First. That it may be by the court adjudged and decreed that the said complainants are the owners of and entitled to the possession of the said placer or petroleum claims above described and the whole thereof as against said defendant, and that the right of possession of said described petroleum claims be adjudged to be in said complainants.

Second. That said defendant be deemed and declared to have no estate, right, title, or interest, or claim thereto, and that he be enjoined from further asserting or claiming any estate, right, title, or interest in or to the said described claims, adverse to complainants, nor to any part or portion thereof and that complainants have such other or further relcif as the nature of the case may require
8 and as may be just and proper, and recover from defendant their costs in this action.

Third. That a writ of subpœna may issue out of this court directed to the said defendant, Samuel McMaster, and commanding him to be and appear before this court, to be holden in and for the county of Laramie as aforesaid, on a day and under a penalty therein specified, and then and there full, true, direct, and perfect answer make to all and singular the premises; and, further, to stand to, perform, and abide such further order, direction, and decree therein as to this court shall seem meet.

J. C. BAIRD,
Solicitor for Complainants.

TERRITORY OF WYOMING, } *ss:*
County of Larvmie, }

On this twentieth day of March, A. D. 1882, personally appeared before me J. C. Baird, who, being duly sworn according to law, upon his oath deposes and says:

That he is the solicitor for the above-named complainants; that the said complainants are non-residents of the county aforesaid; that deponent has read the above bill subscribed by
9 him and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on information and belief, and as to those matters that he believes them to be true.

J. C. BAIRD.

Subscribed and sworn to before me on this 20th day of March, A. D. 1882; and said affiant made oath that he is the solicitor for the above-named complainants; that said complainants are non-residents of the county aforesaid; that the deponent has read the above bill subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be upon information and beleif, and as to those matters that he beleives them to be true.

[Seal C. N. Potter, Notary Public, Laramie C., Wyoming.]

C. N. POTTER,
Notary Public.

(Here follows diagram marked p. 10.)

11 Said bill of complaint is endorsed on the back as follows: Doc. 1. No. 25. First district court. In chancery. Joseph C. Spencer and Ralph C. Webster *vs.* Samuel McMaster. Bill of complaint. Filed Mar. 20th, 1882. Jno. K. Jeffrey, clerk & reg. in chancery. J. C. Baird, solicitor for complainants.

And on the 20th of March, 1882, there was filed in the clerk's office an affidavit for service by publication, which said affidavit is in words and figures following, to wit:

Affidavit for Service by Publication.

TERRITORY OF WYOMING, } *ss:*
County of Laramie, }

In the District Court for the First Judicial District. In Chancery.

JOSEPH C. SPENCER and RALPH C. WEBSTER, Complainants,
vs.
SAMUEL MCMASTER, Defendant.

12 On this twentieth day of March, A. D. 1882, before me, personally appeared J. C. Baird, who, being duly sworn according to law, on his oath deposes and says that he is the solicitor for the above-named complainants; that service of a subpœna cannot be made within this Territory on the said defendant; that the subject of the action relates to real property in this Territory, wherein the said defendant claims an interest, and the relief demanded consists in excluding him from any interest therein, and that the said defendant is a non-resident of Wyoming Territory.

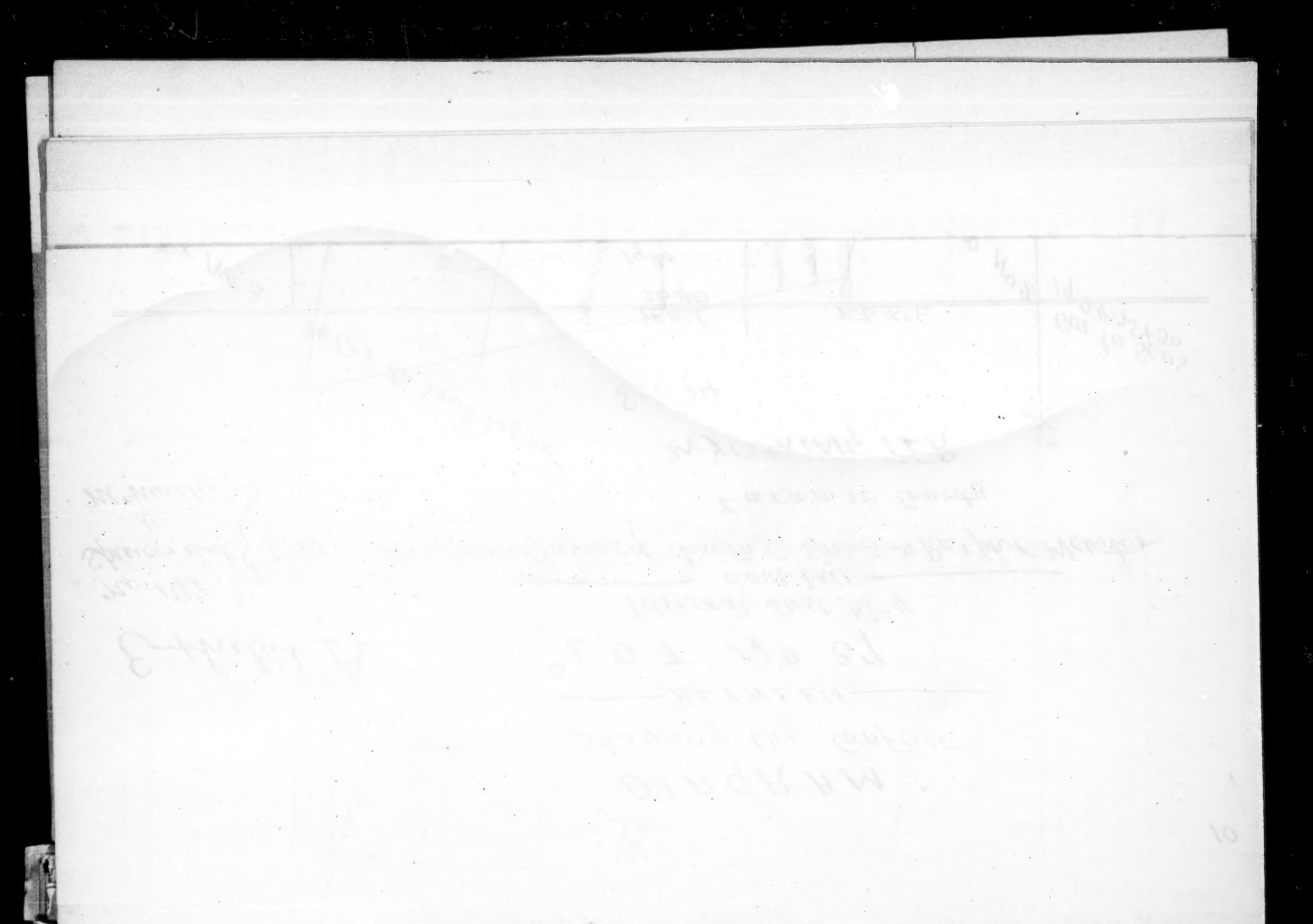
J. C. BAIRD.

Subscribed and sworn to before me this 20th day of March, A. D. 1882.

[Seal C. N. Potter, Notary Public, Laramie Co., Wyoming.]

C. N. POTTER,
Notary Public.

(Endorsed on the back as follows:) Doc. 1. No. 25. First district court. In chancery. Joseph C. Spencer and Ralph C. Webster *vs.* Samuel McMaster. Affidavit for service by publication. Filed Mar. 20th, 1882. Jno. K. Jeffrey, clerk & reg. in chancery.



13 And on the 8th day of May, 1882, there was filed in the clerk's office the "notice of the appearance of Corlett & Rosendale as solicitors for def't;" which said notice was in words and figures as follows, to wit:

TERRITORY OF WYOMING, *County of Laramie:*

In the District Court, Third Judicial District.

JOSEPH C. SPENCER & RALPH C. WEBSTER, Complainants,
vs.
SAMUEL MCMASTER, Defendant.

To the register in chancery of said court:

Please enter our appearance as solicitors & attorneys for defendant in the above-entitled cause.

Dated May 8th, 1882.

Yours, &c., CORLETT & ROSENDALE.

Endorsed on the back as follows:

Doc. 1. No. 25. Spencer & Webster *vs.* McMaster. Notice of appearance of Corlett & Rosendale as solicitors for def't. Filed May 8th, 1882. Jno. K. Jeffrey, clerk & register in chancery.

14 And on the 8th day of May there was filed in the clerk's office a demurrer, which said demurrer was in the words and figures following, to wit:

TERRITORY OF WYOMING, *County of Laramie:*

In the District Court, First Judicial District. In Chancery.

JOSEPH C. SPENCER & RALPH C. WEBSTER, Complainants,
vs.
SAMUEL MCMASTER, Defendant.

The demurrer of the defendant, Samuel McMaster, to the bill of complaint of Joseph C. Spencer & Ralph C. Webster, complainants.

The defendant, by protestation, not confessing or acknowledging all or any of the matters & things in the said bill of complaint to be true in such manner & form as the same are therein and thereby set forth and alleged, doth demur thereto, and for cause of demurrer showeth that the said complainants have not, by their said bill, made such a case as entitled them, in a court of equity, to any relief
15 from or against this defendant touching the matters contained in the said bill or any of such matters.

And this defendant doth further demur & for cause of demurrer showeth that all & every the matters in the said complainants' bill mentioned & complained of are matters which may be tried & determined at law, and with respect to which the said complainant is not entitled to any relief from a court of equity.

And this defendant doth further demur & for cause of demurrer showeth that the said bill of complaint is not verified as required

by law, in this, to wit, that the said bill of complaint is not verified by the complainants or either of them, & that it is not shown that the complainants or either of them were absent from the county in which this action is brought at the time such verification was attempted to be made.

2. That the verification to said bill doth not show that all the facts in the said bill of complaint set forth nor that any of such facts are within the personal knowledge of the solicitor by whom the
16 same is verified, or attempted so to be.

Whereupon this defendant humbly prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, and he prays to be hence dismissed with his reasonable costs in this behalf sustained.

I certify that, in my opinion, the foregoing demurrer to the bill of complaint is well founded in law and proper to be filed in the above cause.

CORLETT & ROSENDALE,
Solicitors for Defendant.

W. W. CORLETT, *Of Counsel.*

(And endorsed on the back as follows:)

Doc. 1. No. 25. Territory of Wyoming, 1st judicial dist. Joseph C. Spencer *et al. vs.* Samuel McMaster. Demurrer. Corlett & Rosendale, *compl'ts'* solicitors. Filed May 8, 1882. Jno. K. Jeffrey, clerk & reg. in chancery.

And on the 16th day of May, 1882, there was filed in the
17 clerk's office a proof of service by publication, which proof of service by publication is in words and figures as follows, to wit:

Legal Notice.

To Samuel McMaster, a non-resident of Wyoming Territory:

You are hereby notified that Joseph C. Spencer and Ralph C. Webster, complainants, did, on the 20th day of March, A. D. 1882, file in the district court of the first judicial district of Wyoming Territory within and for the county of Laramie, on the chancery side thereof, their bill of complaint against you, the object and prayer of which is to determine your claim to, and that you be deemed and declared to have no estate, right, title, or interest in, and that you be enjoien-d from further asserting or claiming any estate, right, title, interest, or claim in or to those certain placer claims or petroleum claims situate, lying, and being on Oil creek, Laramie county, Wyoming Territory, said claims being six in number and containing twenty acres each and located and known as "The Discovery claim," "The No. 1 east of Discovery claim," "The Petroleum Springs
18 claim, "The No. 1 north of Discovery claim," "the No. 2 north of Discovery claim," and "The No. 1 west of Discovery claim," and being more particularly described as follows, to wit: The northwest quarter of the northeast quarter, the southwest quarter of the northeast quarter, the west half of the northeast quarter of the north-

east quarter and the west half of the southeast quarter of the northeast quarter of section twenty-five, township forty-five north and range sixty-two west, in the county of Laramie and Territory of Wyoming, and that the real ownership of and the right of possession of said described petroleum claims be adjudged to be in said complainant- as against said defendant, and that complainants have a decree for their costs, and for such other and further relief as may be meet.

You are hereby notified that you are required to answer said bill of complaint on the 8th day of May, A. D. 1882.

JOSEPH C. SPENCER,
RALPH C. WEBSTER,
Complainants.

By their solicitor, J. C. BAIRD.

JNO. K. JEFFREY,
Register in Chancery of said District Court.

M. 22—1aw6t.

19 TERRITORY OF WYOMING, } ss:
County of Laramie, }

I, J. B. Morrow, of said county of Laramie, do hereby certify that I am the manager of the Cheyenne Daily Leader, a newspaper printed and published in Cheyenne, in said county and Territory; and I further certify that the notice of which the annexed is a true copy has been published in said newspaper for six successive weeks and six times, and that the first publication of said notice was in said paper bearing date the 21st day of March, A. D. 1882, and that the last publication of said notice was in said paper bearing date the 26th day of April, A. D. 1882.

In witness whereof I have hereunto set my hand this 16th day of May, A. D. 1882.

J. B. MORROW.

Subscribed and sworn to before me, a notary public in and for Laramie county, Wyoming Territory.

[Seal John C. Baird, Notary Public, Laramie County, Wyoming.]

JOHN C. BAIRD,
Notary Public.

Endorsed on the back as follows:

20 Doc. 1. No. 25. First dist. court. Spencer & Webster *vs.* McMaster. Proof of service of publication. Filed May 16th, 1882. Jno. K. Jeffrey, clerk & reg. in chancery. J. C. Baird, solicitor for compl't-.

TERRITORY OF WYOMING, } ss:
County of Laramie, }

In the District Court of the First Judicial District. May Term, 1882.
In Chancery..

THURSDAY, *September 14th*, 1882.

And thereupon, on Thursday, September 14th, A. D. 1882, the

same being one of the regular days of the May, A. D. 1882, term of said court, among others, the following proceedings were had, to wit:

JOSEPH C. SPENCER and RALPH C. WEBSTER
vs.
SAMUEL MCMASTER. } No. 25.

The demurrer of the defendant to the complainants' bill of complaint herein having come on to be heard and the court
21 having heard the argument of counsel for the respective parties thereon, and the court having fully considered the same, it is hereby ordered, adjudged, and decreed that the said demurrer be, and the same is hereby, sustained, and that this suit be, and the same is hereby, dismissed.

And on the 13th day of October, 1882, there was filed in the clerk's office a "notice of appeal," which said notice of appeal is in the words and figures following, to wit:

Notice of Appeal.

TERRITORY OF WYOMING, } *ss:*
County of Laramie, }

In the District Court for the First Judicial District. In Chancery.

JOSEPH C. SPENCER & RALPH C. WEBSTER, Plaintiffs,
against
SAMUEL MCMASTER, Defendant.

To Samuel McMaster, defendant in said cause; W. W. Corlett, solicitor, and Corlett & Rosendale, of counsel for said defendant, and to the register of said court.

Now come the above-named complainants, Joseph C. Spencer and Ralph C. Webster, by their solicitor, and hereby each
22 of them appeal from the decree of the said court rendered upon and sustaining the said defendant's demurrer, interposed and — filed, the said complainants' bill of complaint in the above-entitled action, which decree is dated and entered the 14th day of September, A. D. 1882, and from the order for said decree and from each and every part of said decree and order to the supreme court of the Territory of Wyoming; and the said complainants give this notice of appeal accordingly.

Cheyenne, Wyoming, October 13th, 1882.

J. C. BAIRD,
Solicitor for Complainants.
J. C. BAIRD &
WILLIAM WARE PECK,
Of Counsel for said Complainants.

(And endorsed on the back as follows:)

Doc. 1. No. 25. First dist. court. In chancery. Joseph C. Spen-

cer & Ralph C. Webster *vs.* Samuel McMaster. Notice of ap-
23 peal. Filed Oct. 13, 1882. John K. Jeffrey, clerk & reg. in chancery. J. C. Baird, solicitor, & J. C. Baird & William Ware Peck, of counsel for said complainants.

Upon the filing of the said notice of appeal the following minute was made upon the appearance docket of said court in said cause:

"Oct. 13, 1882.—Notice of appeal from order & decree sustaining defendant's demurrer filed." —— ——, 25.

TERRITORY OF WYOMING, } ss:
County of Laramie, }

I, John K. Jeffrey, clerk of the district court of the first judicial district of Wyoming and register in chancery for said court, do hereby certify that the above and foregoing, from and including page one to and including page twenty-three, is a true and correct transcript of all the proceedings had in said court and contains a copy of all the pleadings and of all decrees rendered in the cause of Joseph C. Spencer and Ralph C. Webster *vs.* Samuel McMaster, so full and complete as the same appears of record and on file in said court.

24 Witness my hand and the seal of said court this 23d day of March, A. D. 1883.

[Seal First District Court, Laramie County, Wyoming Territory.]

JOHN K. JEFFREY,
Clerk & Register in Chancery, 1st Dist. Court, Wyo. Ter.

Costs in district court	5	15	reg. costs.
Costs of this transcript	8	85	
Paid by complainants	14	00	
" defendants	3	75	copies.
	17	75	

Endorsed on the back as follows:

Doc. 2. No. 8. Supreme court of Wyoming Territory. Joseph C. Spencer and Ralph C. Webster *vs.* Samuel McMaster. Transcript of record. Filed April 10th, 1883. J. W. Bremer, clerk. J. C. Baird, solicitor for complainants. J. C. Baird & Wm. Ware Peck, of counsel for complainants.

And thereafter, at the regular January term, 1884, of the
25 supreme court of Wyoming Territory, the following journal entries (among others) were entered of record on the journal of said court in the cause aforesaid in the words and figures, to wit:

January Term, 1884.

JOSEPH C. SPENCER and RALPH C. WEBSTER, Appellants,
vs.
SAMUEL MCMASTER, Appellee. } No. 8.

THURSDAY, *January 10th*, 1884.

This day came the parties hereto, by their attorneys, and an-

nounced themselves ready to have this cause heard upon the merits; and thereupon, it appearing to the court that the appellants in this cause have failed and neglected to prepare and file and have at this time not prepared any printed abstract of the record in this cause, as required by rule 12 of this court, it is ordered that the appeal in this cause be dismissed from the docket of this court, and that this order be certified to the district court in and for the first judicial district of this Territory.

26 January Term, 1884.

JOSEPH C. SPENCER and RALPH C. WEBSTER, Appellants,
vs.
SAMUEL MCMASTER, Appellee. } No. 8.

FRIDAY, *January 11th*, 1884.

Come now the said appellants, by counsel, and file their motion, supported by affidavits, to reinstate this case on the docket, which motion is thereupon (taken under consideration by the court) filed by leave of court; it is now further ordered that the sentence in this entry, to wit, "taken under consideration be the court," be stricken from this order.

And thereupon there was filed in said court in the cause aforesaid the following motion and affidavits in the words and figures following, to wit:

TERRITORY OF WYOMING:

Supreme Court.

JOSEPH C. SPENCER and RALPH C. WEBSTER, Appellants,
vs.
SAMUEL MCMASTER, Appellee.

27 Come now the said appellants and, upon the transcript of the record of the district court, the order and decree of the 10th day of January, A. D. 1884, dismissing the appeal, the abstract of said transcript, and the briefs of the parties filed in this court in the case, and all the other files, entries, and proceedings filed, entered, and had in this court in the case, and of the affidavits of J. C. Baird & Wm. Ware Peck annexed, and the affidavit of A. C. Campbell to be filed hereunder, moves the court as follows:

First. That the appellants be allowed a rehearing of and in the matter of said order and decree of dismissal.

Secondly. That said order and decree of dismissal be vacated and held for naught and the case be reinstated upon the docket of the court for a hearing of the appeal therein upon its merits.

Thirdly. That the appellants have such further or other relief as shall be meet in the premises.

J. C. BAIRD,
Solicitor for Appellants.
J. C. BAIRD AND
WILLIAM WARE PECK,
Of Counsel.

28 TERRITORY OF WYOMING, } ss:
County of Laramie, }

J. C. Baird, being duly sworn according to law, on his oath deposes and says that he is the same J. C. Baird who appeared as solicitor in the supreme court of Wyoming Territory for Joseph C. Spencer and Ralph C. Webster, appellants, *vs.* Samuel McMaster, appellee.

That during the week & beginning on the 31st day of December, A. D. 1883, and ending on January 5th, 1884, W. W. Corlett, Esq., and Samuel Rosendale, Esq., composing the firm of Corlett & Rosendale, solicitors for the appellee, each asked affiant for a copy of the abstract of the record in said case for the purpose of preparing their brief, and that said affiant caused a proof copy of said abstract to be furnished to said W. W. Corlett, Esq., and that he subsequently admitted having received the same.

That on a day before obtaining said *said* proof copy the said W. W. Corlett, Esq., while in conversation with this affiant as to the question of time in filing said abstract, said, in substance, that it made no difference as to the time, so that he, the said Corlett, ob-
29 tained a copy of said abstract in time to enable him to prepare his brief, and that he did not subsequently object to said affiant that said printed proof copy was not presented to him in time.

That said affiant was present in said supreme court on Monday, January 7th, 1884, when said case was set down for argument, and that the said Mr. Corlett, who appeared for said appellee, made no objection to the setting of said case for argument, nor did he interpose any objection or motion whatsoever at that time against said argument or as to the time of argument.

That on the day last aforesaid, while the said Mr. Corlett and affiant were in conversation together respecting the said abstract, affiant informed the said Mr. Corlett that the said abstract was printed in connection with the brief of appellants, and that the said Mr. Corlett said in substance that that was probably sufficient, and that his conversation certainly impressed said affiant with the belief that he, the said Mr. Corlett, had no objection to make, either
30 as to the time or as to the manner of printing said abstract.

That said affiant was also present in said supreme court on the 10th day of January, A. D. 1884, and that the said Mr. Corlett, after the case was called up and the argument ordered to proceed, arose and stated that he had some objections to make during the argument as to said abstract; that in reply to an interrogatory from Wm. Ware Peck, Esq., of counsel for said appellants, the said Mr. Corlett said that he had not made any objection as to the time of filing said abstract and did not make such objection.

J. C. BAIRD.

Subscribed and sworn to before me this 11th day of January, A. D. 1884.

[NOTARY PUBLIC SEAL.] A. C. CAMPBELL,
Notary Public.

TERRITORY OF WYOMING, *ss:*

In the Supreme Court.

JOSEPH C. SPENCER and RALPH C. WEBSTER, Appellants,
vs.
SAMUEL MCMASTER, Appellee.

I, William Ware Peck, being of lawful age and first duly
31 sworn, deposes and says as follows:

I have been counsel in the above-entitled case for the appellants since the entry of the appeal therein in this court and am now.

As such I was in this court on the seventh day of January, A. D. 1884, attending to the call of the docket and the assignment of causes for argument, when this case was called by the chief justice; the appeal in it was assigned for hearing and argument to the ninth day of said January, at 10 o'clock a. m., W. W. Corlett, Esq., solicitor and counsel in the cause for the appellee, being present; the cause having been so assigned, I asked for an extension of one-half hour for argument on the part of the appellants, stating as a reason that the case was of a special importance in respect to the claims which were in controversy and to the principals which it involved; that the argument in the district court was elaborate on the demurrer, and would be more so here; the extension was granted; a like one was granted to the appellee, Mr. Corlett either making no objec-
32 tion to the extension to his side or replying that he accepted it; under the orders of assignment and extension the case passed to the tenth day of said January for the hearing of the appeal; on this occasion Mr. Corlett made no objection to the abstract which had been prepared on the part of the appellants, or that it had not been seasonably filed, or that Rule X 12 or any other rule of the court affecting the case had not been complied with by the appellants, or any objection to the hearing of the appeal upon its merits.

On the said tenth day of January the case was called for argument under that assignment, and I was proceeding to open the argument when Mr. Corlett remarked to the court that during his argument he should have some objections or observations—I am uncertain which of the two terms he used—as to the abstract. Having informed the court that my brief contained a complete abstract, and hearing no denial from Mr. Corlett of this statement, I asked him if he objected to the abstract because it had not been
33 filed within the rule time, to which he replied that he did not and had not. Neither when I was a member of this court did I know nor since then have I observed an instance in which Rule XII has been complied with as to time, and my impression has been and is that in a spirit of mutual accommodation the members of the bar have not insisted on its observance as to time, and I can call to mind no instance or impression of an instance prior to this case in which the court has enforced the rule as to time.

WILLIAM WARE PECK.

Sworn and subscribed before me this 11th day of January, A. D. 1884.

[NOTARY PUBLIC SEAL.] A. C. CAMPBELL,
Notary Public.

Endorsed on the back as follows:
In the supreme court. Joseph C. Spencer and Ralph C. Webster, appellants, *vs.* Samuel McMasters, appellee. Motion for rehearing. J. C. Baird, solicitor for app'l's; J. C. Baird & Wm. Ware Peck, of counsel. Filed January 11th, 1884. J. W. Bruner, clerk.

34 TERRITORY OF WYOMING, *ss:*

In the Supreme Court.

JOSEPH C. SPENCER and RALPH C. WEBSTER, Appellants,
vs.
SAMUEL MCMASTER, Appelle-.

I, A. C. Campbell, being first duly sworn, say that I am a member of the bar of Laramie county, said Territory, and a partner of J. C. Baird, Esq., one of the counsel for the appellants in the above-entitled cause; that on or about Jan. 3rd, 1884, I was present at a conversation between Hon. W. W. Corlett, one of the counsel for the appellee, and J. C. Baird, of counsel for the appellants, said conversation being in reference to the above case; Mr. Corlett asked Mr. Baird when his abstract would be ready, and Mr. Baird replied that Judge Peck was now working at it, and would have it ready in a day or so. Mr. Corlett smilingly remarked that the rule of the supreme court, as he remembered it, required the filing of a number of copies some time before the meeting of the court, and further added, "Are you not behind time now?" To this Mr. Baird replied,
35 Perhaps we are somewhat behind time, but, as I understand, the rule is never observed or enforced, and we felt certain you would not object should we not observe it, or take any advantage of the rule. To this Mr. Corlett replied, Certainly not; and added, "I don't care when you file your abstract so I get it in time to make my brief from." Mr. Baird in reply said, "I will see that you get the abstract in time for that."

The above is the substance of the *of the* conversation as I recollect, it; said conversation occurred on the sidewalk in front of Post & Co.'s bank, on Seventeenth St., Cheyenne, Wyo.; that on the 9th day of January, 1884, I called at the office of Mr. Corlett, and while there was handed a brief of appellee by F. S. Hebbard, Esq., he saying that Mr. Corlett had instructed him to give the counsel for the appellee two copies and requested of them two copies of appellants' brief in return.

A. C. CAMPBELL.

Subscribed and sworn to before me this 11th day of January, A. D. 1884.

JOHN C. BAIRD,
Notary Public.

Endorsed on the back as follows:

Territory of Wyoming. In the supreme court. Joseph C. Spencer and Ralph C. Webster *vs.* Samuel McMasters. Affidavit of A. C. Campbell on motion for reinstatement. Filed January 11th, 1884. J. W. Bruner, clerk.

And on the said 11th day of January, 1884, there was filed in said court in the cause aforesaid W. W. Corlett's affidavit, accompanied by a "proof sheet," in the words and figures, to wit:

TERRITORY OF WYOMING, } *ss:*
County of Laramie, }

I, W. W. Corlett, of said county, being first duly sworn, on my oath do depose and say that about ten days before the convening of the January term of the supreme court of said Territory, for the year 1884, I applied to the clerk of the supreme court of said Territory for the copies of the printed abstract in the case then pending in said court, wherein Joseph C. Spencer and Ralph C. Webster were appellants and Samuel McMaster appellee, required to be filed by the appellants, and learned that none had been filed. I made no examination to ascertain whether such abstracts should have been filed before that time under the rules of the court or not, but from mere memory I was under the impression that they should then have been on file. Shortly after making said application to said clerk I applied to J. C. Baird, Esq., one of the solicitors for the appellants, for a copy of appellants' printed copy of the abstract; he said to me that under rule six of the district courts it was not necessary in said case to have any abstract of the record printed and filed, but that he was having the substance of the record printed in the brief for the appellants and he would furnish me as soon as possible with a proof-sheet copy of the substance of the record, if that would answer my purpose. I told him my wish to have a printed copy of the record was to facilitate the preperation of the brief for the appellee, and that it would suffice to furnish me the printed copy in the form proposed. As Mr. Baird claimed to me that it was not necessary to furnish or file any printed copy of an abstract of the record in the case by reason of said rule 6 of the district court, I did not suppose I was receiving from him said proof-sheet copy of a part of his brief as a matter of right, but only as a matter of courtesy, for which I was and am duly grateful. I herewith attach the "proof-sheet," furnished me by Mr. Baird, of a portion of appellants' brief, which is in the same condition when received, except as to marginal notes placed thereon in writing by myself. As this was only a proof-sheet, I did not rely upon it wholly, but obtained and used the original bill of complaint, and used that and the proof-sheet together in preparing the brief of the appellee in said cause. I do not pretend to remember all the conversation occurring on the occasion above named, but I do remember that what is stated above was said. I also beleive that Mr. Baird did, on that occasion, say to me in substance, "You will make no objection, will you, on account

of the time when I will furnish you the proof-sheet copy?" and I said I would not. In view of what he had previously said to me, that it was not necessary in the case to file any printed abstract of the record, I did not at the time understand him
40 to mean anything more than that, as he could not then furnish said "proof-sheet," but would and could furnish it as soon as it was printed, which would be on the following day, I would not object to receive it on the following day. It may be that the object in putting that question to me was to get me to waive some right or privilege of the appellee, but if such was the purpose such purpose had been carefully concealed from me by the previous statement that it was not necessary in this case to file any printed abstract of the record, from which I inferred it was not the intention of the counsel or solicitors for the appellants to file any printed abstract of the record. I did not then nor do I now agree with Mr. Baird in his view of the meaning of said rule 6 of the district courts, but I did not express to him any opinion as to that matter.

I further depose and say that I never at any time in any
41 form or manner stipulated or agreed with any person representing the appellants in said cause in any capacity whatever to waive the application to the case of any of the rules of this court or any rule of law, and that nothing ever occurred between Mr. Baird and myself from which such a claim can be made, unless it is contained in the facts above set forth. The time within which the appellants' printed transcript of the record should have been filed had long since expired before I ever had any conversation with any solicitor or counsel representing the appellants in this case in respect to the furnishing or filing a printed transcript of the record in this case; and while I do not beleive that Mr. Baird in his conversation with me had any purpose or intent of obtaining any concession or stipulation or agreement from me by which the effect of any neglect on the part of appellants in complying with rule 12 of this court could be obviated, yet if such was his intent or purpose, and if it was not true that he thought no printed transcript of
42 an abstract of the record by reason of said rule 6 was necessary, then I was misled, and I ask that the ordinary rule of judicial tribunals be applied to this matter, and that no stipulation or agreement be considered by this court unless the same is in writing or set out in the records of this court, or at least made in the resence of the court. r

I further depose and say that when this case was reached fo hearing the facts then occurring were substantially as follows, as I re call them: The hon. chief justice called for the printed abstract in the case. Mr. Baird remarked that it would be found in the brief of appellants. I then stated that the other side, as I understood it, claimed that no printed abstract, as required by rule 12 of this court, was necessary in this case, and that upon that question I would submit some observations to the court when I should come to make my argument. The court, however, required that question
43 to be determined first. I submitted a few remarks and Judge

Peck submitted a few remarks on the question, after which the court dismissed the case.

W. W. CORLETT.

Subscribed and sworn to before me this 11th day of January, A. D. 1884.

[Seal of Supreme Court.]

J. W. BRUNER,
Clerk Supreme Court.

And attached to the foregoing affidavit is the "proof-sheet" with the marginal notes, which proof-sheet is as follows, to wit, on the following pages:

44 *Statement of Case on Appeal.*

JOSEPH C. SPENCER and RALPH C. WEBSTER, Appellants,
vs.
SAMUEL MCMASTER, Appellee.

The following is the entire substance of the stating part of the bill:

That the orators are and at the hereinafter-mentioned dates were citizens of the United States.

That they are the owners in possession and lawfully entitled to the possession, and that ever since some time during the year of 1877 they and their grantors and predecessors in interest, under and through whom the orators claim right and title, have been the owners and in possession of those certain placer mining claims or petroleum claims situate on Oil creek, in no formed mining district, in the county of Laramie, in said Territory, and more particularly described as follows, namely: The northwest quarter of the northeast quarter and the southwest quarter of the northeast quarter and the west half of the northeast quarter of the northeast quarter of section twenty-five, township forty-five north, of range sixty-two west, in said county, said petroleum claims containing twenty acres each, and located and known as follows, namely: "The Discovery claim," "The No. 1 east of Discovery claim," "The Petroleum Springs claim," "The No. 1 north of Discovery claim," "The No. 2 north of Discovery claim," and "The No. 1 west of Discovery claim," and more particularly described by the annexed diagram "A," which is attached to the bill as a part of it. See copy of diagram in Appeal Book, pp. —, for —.

No allegation that the land contained mines or mineral deposits.

That said locations were made on the public domain of the United States, in full compliance with the laws thereof and those of the Territory, and at the next following dates, namely: "The Discovery claim," on the fifth day of May, 1880, by Joseph C. Spencer; "The No. 1 east of Discovery claim," on the fifth day of May, 1880, by George Burroughs; "The Petroleum Springs claim," on the twenty-seventh day of April, 1881, by Samuel A. Parker; "The No. 1 north of Discovery claim," on the twenty-eighth day of April, 1881, by

☞ See not alleged, where discoveries made, & no direct allegation.

Alexander McDonald; "The No. 2 north of Discovery claim," on the twenty-eighth day of April, 1881, by John McGinnis; "The No. 1 west of Discovery claim," on the twenty-eighth day of April, 1881, by William Haydon; the said named persons and each of them being then citizens of the United States, and having* discovered, at the dates of said locations, valuable deposits of mineral oil or
45 petroleum, and the certificates of said locations were by them caused to be duly recorded in the office of the county clerk and *ex officio* register of deeds of said county.

See no allegation that expenditures made on each claim.

That since the said locations of said petroleum claims on said dates there have been expended by the orators and their grantors and predecessors in interest more than one hundred dollars in each year in labor and improvements in the development of said petroleum claims.

That the defendant claims some right, title, or interest, adverse to the orators, in or to said petroleum claims by virtue of pretended locations of placer mining claims, known, according to the survey thereof, as lot No. 37, for which the defendant, on the thirtieth day of December, 1881, applied to the United States land office at Cheyenne, in said Territory, for a patent from the United States, and wrongfully included in the application said petroleum claims, the property of the orators.

That the defendant's said claim in and to the said petroleum claims is without foundation in law or equity as against the orators, and that the defendant has no estate, right, title, or interest in or to said petroleum claims or any part or portion thereof.

That on the twenty-fourth day of February, 1882, and within sixty days of the first day of publication of the defendant's notice of application for a patent, the orators duly filed in said United States land office adverse claims to the above-described placer or petroleum claims, as wrongfully included by the defendant in said application for a patent, and which are fully shown upon said diagram.

That this action is brought in support of said adverse claims, and within the time prescribed by law, in order to determine the question of the right of possession to the land, or claims herein in controversy, and in order to determine the interest claimed by the defendant.

That the defendant claiming to own the said petroleum claims, and persisting in his said application for a patent therefor—though the orators are the owners in possession, and entitled to the possession of said petroleum claims claimed by the defendant, and the defendant having no right or title thereto, or interest therein—said acts and claims of the defendant cast a cloud upon the right, title, and interest of the orator in and to said petroleum claims; and greatly interfere with and embarrass the orators in their disposition and quiet enjoyment of said placer or petroleum claims.

* "Having" not in bill.

Upon these facts the bill prays in the following words:

First. That it may be by this court adjudged and decreed that the said complainants are the owners of and entitled to the possession of said placer or petroleum claims, above described, and the whole thereof as against said defendant; and that the right of possession of said described petroleum claims be adjudged to be said complainants.

Second. That said defendant be decreed and declared to have no estate, right, title, or interest or claim thereto; and that he be enjoined from further asserting or claiming any estate, right, title, or interest in or to the said described claims adverse to complainants, nor to any part or portion thereof; and that complainants have such other or further relief as the nature of the case may require, and as may be just and proper, and recover from defendant their costs in this action.

Third. That a writ of subpœna may issue out of this court, directed to the said defendant, Samuel McMaster, and commanding him to be and appear before this court, to be holden in and for the county of Laramie as aforesaid, on a day and under a penalty therein specified, and then and there full, true, direct, and perfect answer make to all and singular the premises, and further, to stand
46 to, perform, and abide such further order, direction, and decree therein as to this court shall seem meet. Appeal book, pp. —, for —.

The verification of the bill is in the following words:

TERRITORY OF WYOMING, } ss:
County of Laramie, }

On this twentieth day of March, A. D. 1882, personally appeared before me J. C. Baird, who, being duly sworn according to law, upon his oath deposes and says that he is the solicitor for the above-named complainants; that the said complainants are non-residents of the county aforesaid; that deponent has read the above bill subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on information and belief, and as to those matters that he believes them to be true.

J. C. BAIRD.

Subscribed and sworn to before me on this twentieth day of March, A. D. 1882; and said affiant made oath that he is the solicitor for the above-named complainants; that said complainants are non-residents of the county aforesaid; that the deponent has read the above bill subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be upon information and belief, and as to those matters that he believes them to be true.

[SEAL.] C. N. POTTER,
Notary Public.

Appeal book, pp. — for —.

On the twentieth day of March, 1882, the bill was filed by the orators in the office of the clerk and *ex officio* register in chancery of the district court of the first judicial district of the Territory.

The defendant filed to the bill a demurrer, which alleged as follows:

That the defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in fact, manner, and form as the same are therein and thereby set forth and alleged, demur thereto, and for cause of demurrer showed:

First. That the said complainants have not by their said bill made such a case as entitles them in a court of equity to any relief from or against this defendant touching the matters contained in the said bill or any of such matters.

Secondly. That all and every of the matters in the said complainants' bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said complainants are not entitled to any relief from a court of equity.

Thirdly. That the said bill of complaint is not verified as required by law, in this, to wit, that the said bill of complaint is not verified by the complainants or either of them, and that it is not shown that the complainants or either of them were absent from the county in which this action is brought at the time such verification was attempted to be made; that the verification to said bill of complaint does not show that all the facts in the said bill of complaint set forth, nor that any of such facts are within the personal knowledge of the solicitor by whom the same is verified or attempted so to be.

Upon these alleged causes of demurrer the demurred prayed in the usual form for judgment. Appeal book, pp. —, for —.

47 Upon the bill and demurrer the district court, on the fourteenth day of September, 1882, entered a decree for the defendant, dismissing the bill with costs. Appeal book, pp. — for —, from which decree the orators appealed to this court. Appeal book, pp. — for —.

Endorsed on the back as follows: No. 8. Joseph C. Spencer and Ralph C. Webster, appellants, *vs.* Samuel McMaster, appellee. Affidavit on motion to reinstate cause & for rehearing. Filed January 11th, 1884. J. W. Bruner, clerk. Corlett & Rosendale, sol's for appellee.

48 And thereafter, during the said January term, 1884, of the supreme court of Wyoming Territory, the following journal entries were entered of record in the journal of said court in the cause aforesaid, under their respective dates, to wit:

January Term, 1884.

JOSEPH C. SPENCER and RALPH C. WEBSTER, Appellants,
vs.
SAMUEL MCMASTER, Appellee. } No. 8.

THURSDAY, *January* 17th, 1884.

This day is the motion of said appellants, supported by affidavits, heard, to reinstate this case upon the docket to be heard on its merits, whereupon the same is now taken under consideration by the court.

January Term, 1884.

JOSEPH C. SPENCER and RALPH C. WEBSTER, Appellants,
vs.
SAMUEL MCMASTER, Appellee. } No. 8.

SATURDAY, *March* 8th, 1884.

49 The motion filed in this case on the 11th day of January, D. 1884, and which was argued on the 17th of January, A. D. 1884, to vacate the order of January 10th, 1884, and to hear the case on its merits, having been fully considered by the court, is, for reasons stated in writing and filed with the papers, overruled and denied, and it is ordered that the decree of the court of original jurisdiction, entered September 14, 1882, be, and the same is, in all respects affirmed; whereupon both parties being present by counsel the appellants filed their motion & notice of appeal to the Supreme Court of the United States, from the decree of January 10th, A. D. 1884, as well as this decree, which said appeal is allowed, the affidavits of J. C. Baird and Joseph C. Spencer showing the amount in controversy to be in excess of one thousand dollars and the counsel for the appellee desiring no supersedeas, it is ordered that a bond for costs only be required, and that said bond with good security, as a condition precedent of appeal, be taken and approved before one of the judges of this court in the sum — two hundred and
50 fifty dollars, conditioned according to law, said bond to be given within ninety days and filed with the clerk of this court.

And on said 8th day of March, A. D. 1884, there was filed in said court in the cause aforesaid the opinion of the court, in the words and figures following, to wit:

JOSEPH C. SPENCER and RALPH C. WEBSTER
vs.
SAMUEL MCMASTER.

On the 10th day of January, A. D. 1884, at this term of the court, as the court was proceeding to hear this case upon its merits, the fact was made to appear that no abstract of the case as required by rule 12 of this court had been printed. Rule 12 reads: "No case will hereafter be heard by this court until the appellant or plaintiff

in error shall deliver to the clerk of the court fourteen printed copies of an abstract of so much of the record as is necessary," &c.

51 Thereupon, after consideration, the court ordered this cause dismissed from the docket because of the failure of the counsel for the appellants to comply with rule 12 of this court. On January 11th, 1884, the appellants by counsel filed a motion to reinstate the cause, and supported it by the affidavits of J. C. Baird, A. W. Campbell, and William W. Peck, and the appellee by counsel filed a counter affidavit that of W. W. Corlett, and the application for reinstatement and rehearing has been argued. The appellants undertake to excuse their failure to file the printed abstract as required by rule 12, on two grounds: first, that one of the counsel supposed no abstract necessary under rule six, which provides that where actions are dismissed in the district court by reason of a demurrer to plaintiffs' petition being sustained it shall be sufficient to carry the case up by filing a certified copy of the record with the proofs.

A law proceeding is begun by a petition, a chancery action by a bill of complaint; so, of course, that rule has nothing to do

52 with dispensing with the abstract in a chancery case.

Another excuse offered by counsel for appellants is that counsel for appellants and appellee had an understanding or agreement which was to dispense with the necessity of an abstract, and yet counsel for appellants while seeking to excuse themselves for the lack of an abstract in their brief as presented refer to an appeal-book (it was an appeal or error book before the abstract was substituted by the rule) five times in print, and then erase it with their pen, and in writing put on their brief in these places where the words "appeal book" occur — record.

No appeal book was printed separately from the briefs. The answer to the excuse that the appellants and the appellee had an understanding or agreement which was to dispense with the necessity of a printed abstract is threefold:

First. To use the words of Mr. Justice Blair, who participated in the conference in this cause and has left with the other judges

53 his views in writing, "the court cannot recognize any agreement made by counsel to change the rule of court, and in no case will any agreement of counsel be recognized in this court except upon a stipulation in writing." Again, says Mr. Justice Blair, to grant this motion the court would have to stultify itself and reverse its decision in Bresnahan and Hallack, rendered at the last term of this court, wherein the court say, Mr. Justice Parks delivering the opinion:

In this case the defendant in error filed his motion to dismiss the writ of error and supported it by a number of points, arguments, and authorities. The third point made and insisted on is that the plaintiff in error did not file with the clerk of this court printed abstracts of the record at the time in the manner and in the form required by law. The statute of this Territory provides that the rules of practice of this court shall be as binding upon the several courts and the parties practising and having business therein as

though the same were enactments of the legislative authority
54 of this Territory. One of the rules of this court requires "that the plaintiff in error shall deliver to the clerk 14 printed copies of an abstract of so much of the record as is necessary for a full understanding of all the questions presented to this court for decision," and "if the defendant in error shall deem the abstract of the appellant or plaintiff in error imperfect he may, within twenty days after the delivery of said copies to the clerk, deliver to the latter 14 printed copies of such further or additional abstracts as he shall deem necessary to a full understanding of the questions presented to this court for decision.

The abstract, here made imperative, is not a transcript, which is a full copy of the record, but an epitome, abridgement, or compendium, in which is condensed the substance of the record, so as to enable the court, in language of a learned judge, to extract the controversy in the case from the mass of matter unconnected with it without performing hours of labor which ought to have been done by the counsel for an appellant, under the rule which is so reasonable in itself, and so necessary and, indeed, indispensable
55 to the progress of the court in the discharge of its duty."

The supreme courts of Indiana, Illinois, Missouri, California, and other States often dismiss cases for similar violations of their rules. In the Buckley cases, in 60 Ill., the court say, among other things, "Appellant in each case has failed to prepare and file an abstract of the record, but there has been filed in each case a printed index to the transcript. We presume the attorney was aware of the rules of the court and has intentionally disregarded them. As the cases have not been prepared as required by the rule we decline to consider them, and affirm the judgments;" and so we should be obliged to dispose of this case had it not been continued with the express understanding that it should be heard and decided upon its merits.

Counsel for appellants were very earnest in their arguments that a liberal rule should be applied to this matter, and that a reinstatement might be had and they be allowed to print an abstract.
56 This cause was disposed of in the district court on the 14th day of September, 1882. Notice of appeal was not filed until the 13th of October, 1882, the last day it could have been filed, and the printed briefs were not presented until after this term begun. To do what counsel wished would be to grant them a further postponement in the face of the fact that they have not complied with the rule as to printed abstracts, that rule prescribing the time within which they are to be printed to be within seven months after filing the notice of appeal. To sanction a practice so loose as is urged in this cause cannot be done consistently with equity or justice. The motion to reinstate is unanimously denied.

The decree of the court of original jurisdiction must be enforced.

Endorsed on the back as follows: Doc. 2. No. 8. Spencer & Webster *vs.* McMaster. Opinion by the court by Sener, C. J. Filed M'ch 8th, 1884. J. W. Bruner, clerk.

57 And thereupon on said 8th day of March, A. D. 1884, there was filed in said court in the cause aforesaid the following motion for appeal in the words and figures, to wit:

Territory of Wyoming Supreme Court. January Term, A. D. 1884.

JOSEPH C. SPENCER and RALPH C. WEBSTER, Appellants.
vs.
SAMUEL MCMASTER, Appellee.

The appellants in the above-entitled case move before said court, now in session, for the allowance of an appeal to the Supreme Court of the United States of America from the decree of the said supreme court of Wyoming, rendered at said term, and on the 10th day of January, A. D. 1884, dismissing the appeal taken in the cause from the district court of the first judicial district of the Territory to the supreme court of the Territory, and from every part of said decree; also for the allowance of an appeal to said Supreme Court of
58 the United States of America from the decree of said supreme court of the Territory rendered at said term and on the 11th day of January, A. D. 1884, denying the motion filed in said cause by the appellants on the — day of said January for the vacating of said first-mentioned decree reinstating the appeal and hearing it upon its merits, and from every part of the decree denying said motion.

J. C. BAIRD,
Solicitor for Appellants.

Endorsed on the back as follows: No. 8. In supreme court. Spencer & Webster *vs.* McMaster. Motion for appeal. J. C. Baird, solicitor for appellants. Filed M'ch 8th, 1884. J. W. Bruner, clerk. J. C. Baird, sol. for app'l't. Wm. Ware Peck, of counsel.

And on said 8th day of March, 1884, there was filed in said
59 court in the cause aforesaid the following affidavits of amount in controversy in the words and figures, to wit:

Affidavit of Value of Property in Controversy.

TERRITORY OF WYOMING, *ss:*

In the Supreme Court.

JOSEPH C. SPENCER & RALPH C. WEBSTER, Appellants,
vs.
SAMUEL MCMASTER, Appellee.

TERRITORY OF WYOMING, } *ss:*
County of Laramie, }

Joseph C. Spencer, being duly sworn according to law, on his oath deposes and says he is a citizen of the United States, above the age of twenty-one years; that he is one of the parties of the appellants in the above-entitled cause; that the value of the property in controversy herein was, at the beginning of the said action, has con-

tinued so to be, and is now, in excess of one thousand dollars; that the said affiant is well acquainted with the said property,
60 having worked upon it for several years last past, and testifies understandingly herein, and that the value of the said property really exceeds the sum of two thousand dollars.

JOSEPH C. SPENCER.

Subscribed and sworn to before me this 26th day of February, A. D. 1884.

[Seal of John C. Baird, Notary Public, Laramie Co., Wyoming.]

JOHN C. BAIRD,
Notary Public.

Endorsed on the back as follows:

No. 8. Territory of Wyoming. In the supreme court. Joseph C. Spencer, Ralph C. Webster, appellants, *vs.* Samuel McMaster, appellee. Affidavit of amount in controversy. Filed March 8th, 1884. J. W. Bruner, clerk. J. C. Baird, solicitor for appellants, & Wm. Ware Peck, of counsel.

TERRITORY OF WYOMING, *ss:*

In the Supreme Court.

61 JOSEPH C. SPENCER & RALPH C. WEBSTER, Appellants,
vs.
SAMUEL MCMASTER, Appellee.

J. C. Baird, being duly sworn according to law, on his oath deposes and says that he is a citizen of the United States, above the age of twenty-one years; that he is the solicitor for said appellants, and as such solicitor brought the said action; that he has long been familiar with the above action and value of the lands or placer claims involved in this action; that in his judgment the amount in controversy herein was at the beginning of this action, has continued so to be, and is now in excess of the sum of one thousand dollars, exclusive of costs. By the amount in controversy herein, exclusive of costs, I mean the value of the lands or placer claims set up by and claimed by the said appellants in their bill of complaint herein, and concerning which they brought their action originally.

J. C. BAIRD.

Subscribed and sworn to before me this 8th day of March, A. D. 1884.

[Seal Supreme Court.]

J. W. BRUNER,
Clerk Supreme Court, Wyoming Territory.

62 Endorsed on the back as follows: No. 8. In supreme court. Spencer & Webster *vs.* McMaster. Affidavit of amount in controversy. Filed March 8th, 1884. J. W. Bruner, clerk. J. C. Baird, solicitor app'l'ts. Wm. Ware Peck, of counsel.

And thereafter, on June 5th, A. D. 1884, there was filed in said court in the cause aforesaid a bond in the words and figures, to wit:

TERRITORY OF WYOMING, *ss:*

In the Supreme Court.

JOSEPH C. SPENCER & RALPH C. WEBSTER, Appellants,
against
SAMUEL MCMASTER, Appellee.

Bond for Costs on Appeal.

Know all men by these presents that I, Isaac Bergman, of the county of Laramie, Territory of Wyoming, am held and firmly bound unto Samuel McMaster in the sum of two hundred &
63 fifty dollars, good and lawful money of the United States of America, to be paid to the said Samuel McMaster, his heirs, executors, administrators, and assigns, to which payment, well and truly to be made, I do bind myself, my heirs, executors, and assigns, and each and every of them, firmly by these presents.

Sealed with my seal and dated the third day of June, A. D. 1884.

The condition of the above obligation is such that whereas the appellants in the case of Joseph C. Spencer & Ralph C. Webster, appellants, against Samuel McMaster, appellee, in the supreme court of the Territory of Wyoming, have appealed from the certain decree of the said supreme court of the Territory of Wyoming to the Supreme Court of the United States, which said decree was rendered in said entitled action by the said supreme court of the Territory of Wyoming at the January, 1884, term of said court:

Now, therefore, if the said appellants shall prosecute their said appeal to effect, and if they fail to make their said plea good,
64 and if they shall answer all costs arising from said appeal, should they fail therein, then this obligation to be void and of no effect, or else to remain and be in full force and virtue in law.

In witness whereof I have hereunto set my hand and seal the day and year first aforesaid.

ISAAC BERGMAN. [SEAL.]

Signed, sealed, and delivered in presence of—
SUMNER JOHNSON.

I hereby approve the above bond.
June 3rd, 1884.

JACOB B. BLAIR,
Associate Justice of the Supreme Court of Wyoming Territory.

Endorsed on the back as follows:

Doc. 2. No. 8. In the supreme court, Territory of Wyoming. Joseph C. Spencer and Ralph C. Webster, appellants, *vs.* Samuel McMaster, appellee. Bond for costs on appeal. J. C. Baird, solicitor for app'l'ts. Wm. Ware Peck, of counsel. Filed June 5th, 1884. J. W. Bruner, clerk.

65 And thereafter, to wit, on July 30th, A. D. 1884, there was filed in court in the cause aforesaid a citation and acknowledgement of service in the words and figures following, to wit:

By the Hon. John W. Lacey, chief justice of the supreme court of the Territory of Wyoming, to Samuel McMaster:

Whereas Joseph C. Spencer and Ralph C. Webster have lately appealed to the Supreme Court of the United States from a decree lately rendered in the supreme court of the Territory of Wyoming made in favor of you, the said Samuel McMaster, and have filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court of the United States, at the city of Washington, District of Columbia, on the 13th day of October next, to do and receive what may appertain to justice to be done in the premises.

66 Given under my hand, at the city of Cheyenne, in the Territory of Wyoming, the 29th day of July, A. D. one thousand eight hundred and eighty-four.

JOHN W. LACEY,
Chief Justice of the Supreme Court of the Territory of Wyoming.

Service of the above by copy acknowledged this 29th day of July, 1884.

W. W. CORLETT,
Solicitor for said Samuel McMaster in said Cause.

Endorsed on the back as follows:

In supreme court. Joseph C. Spencer & Ralph C. Webster, appellants, *vs.* Samuel McMaster, appellee. Citation and acknowledgment of service. Filed July 30th, 1884. J. W. Bruner, clerk supreme court.

67 TERRITORY OF WYOMING, *ss:*

I, J. W. Bruner, clerk of the supreme court of the said Territory, do hereby certify that the above and foregoing pages contain a full, true, and correct copy of the transcript of record, motion and affidavits for rehearing, affidavit on motion to reinstate cause for rehearing, journal entries, opinion by the court, motion for appeal, affidavits of amount in controversy, bond for costs on appeal and citation in the case entitled Joseph C. Spencer and Ralph C. Webster, appellants, *vs.* Samuel McMaster, appellee, so full and entire as the same remains on file and of record in the clerk's office of said supreme court.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Cheyenne city, this first day of August, A. D. 1884.

[Seal Territory of Wyoming Supreme Court.]

J. W. BRUNER,
Clerk Supreme Court, Wyoming Territory.

Costs of this transcript, $24.50.

68 TERRITORY OF WYOMING, *ss:*

I, John W. Lacey, chief justice of the supreme court of Wyoming Territory, do hereby certify that J. W. Bruner, whose name is subscribed to the foregoing certificate, now is and was at the time of signing and sealing the same the clerk of said supreme court and *and* the keeper of the records and seal thereof, and that said clerk was duly appointed and qualified to office as such clerk, and that full faith and credit are and of right ought to be given to all of his official acts as such clerk in all courts of record in the United States and elsewhere; that his said certificate is in due form of law, and that his signature thereto subscribed is genuine.

Given under my hand this 1st day of August, A. D. 1884.

JOHN W. LACEY,

Chief Justice of the Supreme Court of Wyoming Territory.

69 EXHIBIT A.

Statement of Case on Appeal.

TERRITORY OF WYOMING, *ss:*

In the Supreme Court.

JOSEPH C. SPENCER and RALPH C. WEBSTER, Appellants,

vs.

SAMUEL MCMASTER, Appellee.

The following is the entire substance of the stating part of the bill:

That the orators are and at the hereinafter-mentioned dates were citizens of the United States.

That they are the owners in possession and lawfully entitled to the possession, and that ever since some time during the year of 1877 they and their grantors and predecessors in interest, under and through whom the orators claim right and title, have been the owners and in possession of those certain placer mining
70 claims or petroleum claims situate on Oil creek, in no formed mining district, in the county of Laramie, in said Territory; and more particularly described as follows, namely: The northwest quarter of the northeast quarter and the southwest quarter of the northeast quarter and the west half of the northeast quarter of the northeast quarter of section twenty-five, township forty-five north, of range sixty-two west, in said county; said petroleum claims containing twenty acres each, and located and known as follows, namely: "The Discovery claim," "The No. 1 east of Discovery claim," "The Petroleum Springs claim," "The No. 1 north of Discovery claim," "The No. 2 north of Discovery claim," and "The No. 1 west of Discovery claim;" and more particularly described by the annexed diagram "A," which is attached to the bill as a part of it. See copy of diagram in record, folio 9.

That said locations were made on the public domain of the United States in full compliance with the laws thereof and those of the Territory, and at the next following dates, namely: "The Discovery

claim" on the fifth day of May, 1880, by Joseph C. Spencer; "The No. 1 east of Discovery claim" on the fifth day of May, 1880, by George Burrough; "The Petroleum Springs claim" on the twenty-seventh day of April, 1881, by Samuel A. Parker; "The No. 1 north of Discovery claim" on the twenty-eighth day of April, 1881, by Alexander McDonald; "The No. 2 north of Discovery claim" on the twenty-eighth day of April, 1881, by John McGinniss; "The No. 1 west of Discovery claim" on the twenty-eighth day of April, 1881, by William Haydon; the said named persons and each of them being then citizens of the United States, and having discovered at the dates of said locations valuable deposits of mineral oil or
71 petroleum, and the certificates of said locations were by them caused to be duly recorded in the office of the county clerk and *ex officio* register of deeds of said county.

That since the said locations of said petroleum claims on said dates there have been expended by the orators and their grantors and predecessors in interest more than one hundred dollars in each year in labor and improvements in the development of said petroleum claims.

That the defendant claims some right, title, or interest adverse to the orators in or to said petroleum claims by virtue of pretended locations of placer mining claims, known, according to the survey thereof, as lot No. 37, for which the defendant, on the thirtieth day of December, 1881, applied to the United States land office at Cheyenne, in said Territory, for a patent from the United States, and wrongfully included in the application said petroleum claims, the property of the orators.

That the defendant's said claim in and to the said petroleum claims is without foundation in law or equity as against the orators, and that the defendant has no estate, right, title, or interest in or to said petroleum claims or any part or portion thereof.

That on the twenty-fourth day of February, 1882, and within sixty days of the first day of publication of the defendant's notice of application for a patent, the orators duly filed in said United States land office adverse claims to the above-described placer or petroleum claims as wrongfully included by the defendant in said application for a patent, and which are fully shown upon said diagram.

That this action is brought in support of said adverse claims, and within the time prescribed by law, in order to determine the question of the right of possession to the land or claims herein in controversy, and in order to determine the interest claimed by the defendant.

That the defendant claiming to own the said petroleum
72 claims, and persisting in his said application for a patent therefor, though the orators are the owners in possession and entitled to the possession of said petroleum claims claimed by the defendant, and the defendant having no right or title thereto or interest therein, said acts and claims of the defendant cast a cloud upon the right, title, and interest of the orators in and to said petroleum claim, and greatly interfere with and embarrass the orators in their disposition and quiet enjoyment of said placer or petroleum claims.

Upon these facts the bill prays in the following words:

First. That it may be by this court adjudged and decreed that the said complainants are the owners of and entitled to the possession of said placer or petroleum claims above described and the whole thereof as against said defendant, and that the right of possession of said described petroleum claims be adjudged to be said complainants'.

Second. That said defendant be decreed and declared to have no estate, right, title, or interest or claim thereto, and that he be enjoined from further asserting or claiming any estate, right, title, or interest in or to the said described claims adverse to complainants, nor to any part or portion thereof, and that complainants have such other or further relief as the nature of the case may require and as may be just and proper, and recover from defendant their costs in this action.

Third. That a writ of subpœna may issue out of this court, directed to the said defendant, Samuel McMaster, and commanding him to be and appear before this court, to be holden in and for the county of Laramie as aforesaid, on a day and under a penalty therein specified, and then and there full, true, direct, and perfect answer make to all and singular the premises; and, further, to stand to, perform, and abide such further order, direction, and decree therein as to this court shall seem meet. Record, folios 6 to 7.

73

The verification of the bill is in the following words:

TERRITORY OF WYOMING, } ss:
County of Laramie, }

On this twentieth day of March, A. D. 1882, personally appeared before me J. C. Baird, who, being duly sworn according to law, upon his oath deposes and says that he is the solicitor for the above-named complainants; that said complainants are non-residents of the county aforesaid; that deponent has read the above bill subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on information and belief, and as to those matters that he believes them to be true.

J. C. BAIRD.

Subscribed and sworn to before me on this twentieth day of March, A. D. 1882; that said affiant made oath that he is the solicitor for the above-named complainants; that said complainants are non-residents of the county aforesaid; that the deponent has read the above bill subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be upon information and belief, and as to those matters he believes them to be true.

[SEAL.] C. N. POTTER,
Notary Public.

Record, pp. 7 & 8.

On the twentieth day of March, 1882, the bill was filed by the orators in the office of the clerk and *ex officio* register in chancery of

the district court of the first judicial district of the Territory.

74 The defendant filed to the bill a demurrer, which alleged as follows:

That the defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in fact, manner, and form as the same are therein and thereby set forth and alleged, demurred thereto, and for cause of demurrer showed:

First. That the said complainants have not by their said bill made such a case as entitles them in a court of equity to any relief from or against this defendant touching the matters contained in the said bill or any of such matters.

Secondly. That all and every of the matters in the said complainants' bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said complainants are not entitled to any relief from a court of equity.

Thirdly. That the said bill of complaint is not verified as required by law, in this, to wit: That the said bill of complaint is not verified by the complainants or either of them, and that it is not shown that the complainants or either of them were absent from the county in which this action is brought at the time such verification was attempted to be made; that the verification to said bill of complaint does not show that all the facts in the said bill of complaint set forth nor that any of such facts are within the personal knowledge of the solicitor by whom the same is verified or attempted so to be.

Upon these alleged causes of demurrer the demurrer prayed in the usual form for judgment.

Record, folios 14, 15, & 16.

75 Upon the bill and demurrer the district court, on the fourteenth day of September, 1882, entered a decree for the defendant dismissing the bill, with costs (record, pp. 21, 22); from which decree the orators appealed to this court. Record, folios 22 & 23.

76 *Points.*

First.

The third ground of the demurrer is not well taken. A defect of verification can be reached only by motion to strike from the files. A demurrer reaches only objects of substance and a defect of power in stating substance.

Secondly.

As to the first and second grounds of demurrer, the specifications are of the same grounds differently stated. A case which secures relief in equity comes within the jurisdiction of equity to grant relief; a case which does not secure relief in equity does not come within the jurisdiction of equity to grant relief. Thus the specifications in effect say the complainants have made a case that entitles them to relief, but at law, not in equity.

First. Cloud upon real estate title is a subject of original equity jurisdiction.

Secondly. A system of united law and equity procedure is unnecessary to sustain this case. Such a system does not alter
77 rights, principles, or jurisdiction. It does not alter remedies, except to permit law and equity rights to be embodied in one suit, or the exercise in one suit of corresponding but distinct law and equity jurisdictions, through corresponding but distinct remedies.

Thirdly. The bill states a case for equitable relief against a cloud upon title and prays appropriately for the purpose. The stated case gives a right to relief against a cloud the same as it would had the bill been brought before the defendant applied for a patent, in which case a subsequent application would not oust the suit the same as it would had he not applied for a patent, *non constat* that he will continue his application. It is optional with himself to continue it or not. The application is merely an attempt to increase cloud, the pre-existence of which is complete ground for equity relief. The bill is, therefore, to be sustained upon the ground of general equity jurisdiction, irrespective of sections 2318 to 2336, ch. six, page 424, of the U. S. Rev. Stat., so far as those sections relate to a determination of the right of possession as between conflicting claimants. It is true that should the application be continued and the suit not be prosecuted so as to satisfy that provision the complainants' claims, though valid, would lapse, but only because of laches. This does not affect the principle of general or common law equity jurisdiction. In respect to equity jurisdiction the case stands, in principle, as it would if, upon the present fact, and the further fact of a tortious possession by the defendant, the complainants had sought a determination of title at law in ejectment or trespass. The right to the suit under general common law jurisdiction at law could not be controlled by the defendant's right of applying for a patent—suspended until he did apply, or ousted if he should apply.

78 The value of this proposition is that it tests the propriety of the bill under general common law jurisdiction in equity.

Turning to said sections 2329 and 2318 to 2326, they agree with this proposition as to general jurisdiction of equity at common law and furnish a basis for the application of the principle that equity may remove a cloud from such estate title. The sections are as follows:

SECTION 2329. "Claims, usually called 'placers,' including all forms of deposit excepting veins of quartz or other rock in place, shall be subject to entry and patent under like circumstances and conditions and upon similar proceedings as are provided for vein or lode claims."

SECTION 2318. "Lands valuable for minerals are reserved from sale."

SECTION 2319. "All valuable mineral deposits in lands belonging to the United States, surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens

of the United States and those who have declared their intention to become such under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

SECTION 2320. That mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed, as to length along the vein or lode, by the custom, regulations, and laws in force at the date of their location; that a mining claim located after the 10th day of May, 1872, and whether by one or more persons, may equal but shall not exceed fifteen hundred feet in length along the vein or lode, but no locations shall be made until the discovery of the vein or lode within the limits of the location; that no claim shall extend over three hundred feet on each side of the middle of the vein at the surface, nor be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights, existing on the 10th day of May, 1872, render such limitation necessary; that the end lines of each claim shall be parallel.

79

SECTION 2321. That proof of citizenship may consist, in the case of an individual, of his affidavit; in that of an unincorporated association of the affidavit of its agent, and in that of a corporation organized under the laws of the United States or of a State or Territory, in filing of a certified copy of the charter or certificate of incorporation.

SECTION 2322. That the location of all mining claims on any mineral vein, lode, or ledge of the public domain and their representatives, where no adverse claim exists on the 10th day of May, 1872, so long as they comply with the laws of the United States and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of this location and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location; but their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes, driven downward, as above described, through the end lines of their location, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges; and nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

80

SECTION 2323. "Where a tunnel is run for the development of a vein or lode or for the discovery of mines the owners of such tun-

nel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

SECTION 2324. "The miners of each mining district may make regulations not in conflict with the laws of the United States or with the laws of the State or Territory in which the district is situated governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground, so that its boundaries can be readily traced. All records of mining claims, hereafter made, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim. On each claim located after the 10th day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvement made during each year. On all claims located
81 prior to the 10th day of May, 1872, ten dollars' worth of labor shall be performed or improvements made by the 10th day of June, 1874, and each year thereafter, for each one hundred feet in length along the vein, until a patent has been issued therefor; but when such claims are held in common such expenditure may be made upon any one claim; and upon a failure to comply with these conditions the claim or mine upon which such failure occurs shall be open to relocation in the same manner as if no location of the same had ever been made: Provided, That the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his portion of the expenditures required hereby the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owners personal notice in writing, or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days; and if, at the expiration of ninety days after such notice in writing or by publication, such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section his interest in the claim shall become the property of his co-owners, who have made the required expenditures.

"That section 2324 of the Revised Statutes be, and the same is hereby, amended so that where a person or company has or may secure a tunnel for the purpose of developing a lode or lodes, owned by such person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes,

whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on
82 the surface of said lode or lodes in order to hold the same, as required by said act."

SECTION 2325. "A patent for any land claimed and located for valuable deposits may be obtained in the following manner, viz: Any person, association, or corporation, authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has or have complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat, previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated or published nearest to such claim, and he shall also post such notice in his office for the same period. The claimant, at the time of making such application, or at any time thereafter within the sixty days of publication, shall file with the register a certificate of the United States surveyor general that five hundred dollars' worth of labor has been performed or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as
83 shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit showing that the plat and notice had been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

SECTION 2326. "Where an adverse claim is filed during the period of publication it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing the affidavit thereof, shall be stayed

until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered the party entitled to the possession of the claim or any portion thereof may, without further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or im-
84 provements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceeding and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim each party may pay for his portion of the claim with the proper fees, and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever."

SECTION 2332. * * * "But nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim, or property thereto attached, prior to the issuance of a patent."

I.

A valid location confers title, and the locator—between location and patent—is not seeking to obtain, but to perfect an obtained title. His title in the location is inseparably united with the
85 right of possession; neither can exist without the other. The location title is exclusive and paramount as to all the world except the Government, and as to the latter is subject only to the condition upon the location; owner to take prescribed steps for obtaining a patent—the issuance of which, under the condition, he controls. The location and the patent cover, each, the same fee. Hence the location interest—as it is not a license, a lien, an estate at will for a term or for life, yet is an estate—must be an equitable fee, and incipient, but only in the sense that it remains to be converted into a perfect fee at law. As an equitable fee, equity could enforce the issuance of a patent to satisfy it, as it could enforce the execution of a deed to satisfy a private contract for the conveyance

of real estate. Chapter six operates as a conditional grant. A location made and by occupation and expenditures preserved under it, and because made and preserved in the faith of it, satisfies the conditions of the grant; besides, the Government contract arises and entitles the locator to a patent. Fletcher *vs.* Peck, 6 Cranch, 87, was decided upon this principle.

"If a legislature make a grant of lands in fee simple a subsequent legislature cannot take away the title of a *bona fide* purchaser for valuable consideration from the first grantee upon the ground that the grant was fraudulent.

"When a law is a contract a repeal of that law cannot take away rights vested under that contract.

"A grant made in pursuance of a contract is an executed contract and its obligations cannot be impaired by a law of a State.

"A grant implies a contract by the grantor not to reassert the title granted.

"Contracts made by a State are within the Constitution of the United States."

Chapter six proceeds solely upon the idea of a conditional
86 contract with the locator for a patent; unless construed by that idea, is a delusion. As section 2329 provides that placer claims shall be entered and patented under circumstances, conditions, and proceedings like to those under which vein or lode claims are entered and patented—which latter, therefore, determine the nature and extent of the right which is obtained by a location validly made and procured—we recur to the latter and ascertain the nature and extent of the locator's location right.

Sections 2318 and 2319 "subject" all mineral lands to occupation, exploration, and purchase. To be a subject is necessarily to be under and bound by the right of occupation for the purpose of exploration and purchase.

Section 2321 prescribes the proof of qualification as to citizenship, as qualifying to be locator and patentee.

Section 2320 conditions the making of a location upon a pre-discovery within the limits of the location—plainly intending that the location, as a right and as a stimulus to discovery, shall be the reward of the discoverer—and thus proceeding upon a pre-established and uniform principle of mining law applying to the mineral domains all nations, and ruling between the Government and the explorer, that to the discoverer shall belong the mine discovered.

Section 2322 confers upon the locator "the exclusive right of possession and enjoyment of all" that is upon and underneath the surface of the location, extends to the center of the earth, and covers all the deposits lying within and all the products obtained from without the location limits. The term "enjoyment" means more than possession; it embraces ownership and use—all that the fee can include and consist of. The estate is more than property, and the property title is but an incident.

Section 2323 confers upon tunnel developments the same degree of estate which section 2322 confers upon the ordinary location.

87 Sections 2320 and 2324 prescribes the mode of making and

the latter the mode of preserving a location. The latter also provides in the case of co-owners for the transfer of the interest in the claim of delinquent to the non-delinquent contributors to its expenses.

Section 2325 prescribes the steps which are requisite and sufficient to obtain a patent if the location conditions have been observed, and recognizes in the location owner the exclusive right to a patent and the exclusive control of its issuance.

Section 2326 refers to the courts the question of the right of possession, which means not the superior right as between tort persons, neither of whom has a right against the Government, but the right against the Goverment which is founded on a valid location.

The sections throughout designate and treat the location as a "claim," which remains a valid claim; the claim as an "interest," which remains a valid interest; the locator or his successor as the "owner," which means the representative of title.

Section 2332 intends by "lien" a real estate lien, which can attach only to title.

7 Cal., 152, McCowen *v.* McGormell.
7 Cal., 327, Merced M. Co. *v.* Fremont.
7 Cal., 37, Atwood *v.* Tricot.
7 Cal., 141, Head *v.* Fordyce.
35 Cal., 30, Puleis *v.* Pacific N. Co.
4 Col., 38, Sears *v.* Taylor.
13 Nev., 395, Hamon *v.* Christoval.
15 Nev., 101, Brophy M. C. *v.* Brophy and D. G. Co.

88 II.

If the location does not confer an equitable fee it does confer an irrevocable property right and usufruct. This is a definite and fixed interest in the realty, a title inchoate only in the sense that the owner may mature it into a full title and necessitates protection.

III.

Whether the estate be an equitable fee or an irrevocable property right and usufruct it is a basis for ejectment or trespass, if the possession under it is intruded upon; must, therefore, be equally a basis for equitable relief against a cloud, whether the possession is or is not intruded upon. The difference is simply of remedy applicable to the same title, and is adapted to the difference in the form of prejudice to the title. It may be treated as an axiom that whatever realty interest is entitled to protection at law, is equally entitled to it in equity according to the difference in prejudice.

IV.

Where the true title is threatened with prejudice by one who claims under a writing which creates an aspect of superior and adverse right a cloud arises entitling the real owner to relief under
89 general equity jurisdiction as that exists at common law, and it is the existence, not the cause of the cloud, that necessitates the relief and confers upon equity the jurisdiction to grant it. Hence

it is immaterial whether the cloud arises from fraud, misapprehension, or neglect, or in the form of an apparent lien or encumbrance, a minor estate, or a fee. So, too, a cloud arises where an act or a series of acts have transpired, or are transpiring, which, consummated, will produce a written aspect, whether in record or other form, of a true but in fact of a false title.

Hence it suffices to invoke equity jurisdiction or relief against cloud that the existing or prospective writing can be used to vex—that is, to prejudice—the true title.

1 Story's E. J., secs. 692, 700, 700*a*.
51 Mo, 33, McPike *v.* Pree.
8 Kansas, 496, Benner *v.* Bigelow.
13 Kansas, 476, Gitterson *v.* Lemest.
5 Paige, 493, Pettit *v.* Shepherd.
6 Paige, 262, Oakly *v.* Trustees of W.
42 Iowa, 259, Lockwood *v.* Rittingham.
50 Miss., 363, Irwin *v* Lewis.
80 N. C., 157, Banks *v.* Parker.
26 Wis., 91, Ely *v.* Wilcox.
48 N. Y., 193, Fonda *v.* Sage.
48 N. Y., 486, Newell *v.* Whaler.
56 Ill., 262, Gosse *v.* Rorhbach.
56 Ill., 268, Gosse *v.* Billings.
56 Ill., 30, Gosse *v.* Chapman.
57 Ill., 226, O'Connor *v.* Wilson.
58 Ill., 431, Hodge *v.* Gullery.
60 Ill., 205, Barnett *v.* Cline.
62 Ill., 429, Lee *v.* Ruggles.
84 Ill., 456, Danforth *v.* Vanisol.
87 Ill., 442, Phelps *v.* Harding.
44 Conn., 455, Allen *v.* Lurber.

90 V.

Tested by these considerations, the bill brings the case within this equity jurisdiction.

It shows in the orators locations validly made and preserved.

It shows that the defendant has located upon the area of the orators; that his locations were pretentious and false, representing no right, title, or interest in it; that he applied for a patent for his location, and therefore under section 2325; that the orators filed against the application their notice of adverse claim, and therefore under the same section, and next brought this bill to test the question of title to the disputed area, and therefore under section 2326.

The defendant's locations, laid out and recorded under sections 2320, 2322, and 2324—whether defective upon their face because not following the process prescribed by the instructions; or, if regular on their face, lapsed, because not preserved by compliance with section 2324; or, if regular on their face, laid upon the existing and valid locations of the orators—are fictitious and of record, having the aspect, not the substance, of valid locations, and would, without application for patents upon them, constitute clouds against the ora-

tors. But the applications filed and of record in the land office constitute record claims of title, and would be a cloud of themselves, even if preceded only by matters *in pais* on the part of the defendant; and, aiming to cover fictitious locations by patent, seek to confirm them and to consummate the clouds by the conclusive evidence of patent title. Thus both parties appear by record or writing to hold conflicting locations upon the same area—those of the orators being true, those of the defendant false. Thus the allegation
91 that cloud exists is true, but superfluous, being only the legal conclusion of the facts, which completely present the conclusion.

The prayer is appropriate to the mischief.

13 Mich., 368, Meron *v.* Palmer.

VI.

Unless the orators can resort to equity they are remediless.

Thirdly.

The first and second grounds of the demurrer confine the inquiry as to the merits of the bill to the question whether the district court had jurisdiction to remove the cloud only on its law or also on its equity side, thus conceding that if that court had equitable jurisdiction as to cloud upon title the bill contains a proper case and proper for the exercise of that jurisdiction. The question depends upon the construction of said section 2326 and of section 556, page 110, of the compiled laws of Wyoming, whether the latter be or be not in conflict with section 654, at page 120, same laws.

First. As to said section 2326, this suit is sustainable under it. The term "judgment" employed by it means simply the de-
92 cision of a court, whose jurisdiction is competent to the determination in the given case of the disputed right of possession.

Conflicting claims to a patent for a given location having been presented to the Government it suspends until it has been adjudicated which, if either, of the claimants is the real owner. For this purpose it suffices to refer to the courts simply the question which, if either, has the right of possession—that is, the true location. Determining the former determines the latter—determines the location title. The issue is one of title—the determination is one of title. The section refers this question in the broadest terms by declaring that "all proceedings * * *. shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction or the adverse claim waived. It shall be the duty of the adverse claimant within thirty days after filing his claim to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession and prosecute the same with reasonable diligence to final judgment, and a failure to do so will be a waiver of his adverse claim." The adverse claimant is thus required and therefore permitted to institute in a court; whose jurisdiction is competent to the decision of the question, pro-

ceedings which are appropriate to the purpose. To accomplish that purpose the statute should and does provide for a resort to law or equity, according to the exigencies of the case. The idea that the provision restricts to a resort to law is purely assumptive and without the color of a suggestion in that section. Such restriction would be inadequate to the object. The comprehensive terms of the section match the object in letter and spirit. It is immaterial to the Government what the remedy is, provided that it suffices; it is material to the adverse claimant that it should suffice. If upon the present facts the orators could not resort to equity under this
93 section they would be remediless as against the defendant's application for a patent in any jurisdiction where chancery powers could be exercised only in a court of chancery, and the Government would be compelled to withhold the patent from each because of an inability to ascertain to which of the two it belonged, and in fact this necessity would be the result of the construction which the defendant applies to the statute.

The term "judgment" generically embraces decisions both at law and in equity. Bouvier defines a decree as the "judgment of a court of equity." "Adjudged," as the verb corelative to the noun judgment, is technically employed in a decree. Hence "judgment," as employed in the section, embraces law and equity decisions.

Secondly. As to sections 556 and 654, the former declares: "An action may be brought by any person in possession, by himself or tenant, of real property against any person who claims an estate or interest therein adverse to him for the purpose of determining such adverse estate or interest." The latter declares: "For the purpose of proceeding under the provisions of this code, the terms 'real estate,' 'real property,' and 'realty' shall include mines, mining property, property right to lands, and all other property of a fixed and immovable nature, whether the same be of the class or classes above enumerated or of other classes or kinds of property."

The terms "estate," "interest," in the former embrace all the interests which are designated in the latter. The latter may therefore be dismissed from further consideration.

No intelligent construction of section 556 will deprive
94 the district court of jurisdiction of this suit upon its chancery side.

I.

The organic act at section 9 declares that the "supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction for redress of all wrongs committed against the Constitution and laws of the United States or of the Territory affecting persons or property." Shall makes the provision mandatory; "wrongs" are violations of right; thus the jurisdiction is imposed for every right. Jurisdiction includes power in the form of remedy for the vindication of rights. Hence the necessary import of the provision is that the law jurisdiction shall be exercised through law remedies—the chancery through chancery remedies. Hence, also, it is consistent with the provision that the two jurisdictions should

be kept separate from and exclusive of each other. The civil code observes this idea—has created the separation and exclusion. Its sections 1 to 55, inclusive, provide law remedies for law jurisdiction; its sections 656 to 711, inclusive, provide chancery remedies for chancery jurisdiction.

Section 556 can be entirely and consistently satisfied by confining it to law jurisdiction.

95 II.

Assume that the section confers upon the law side of the court chancery jurisdiction—

It is a rigid and fixed principle that if a power original in chancery is conferred upon a law court it is expanded, not shifted, unless express terms or necessary implication require it to be treated as shifted, not expanded. The presumption is violent that the purpose was not to limit chancery, but to enlarge law jurisdiction in favor of remedy. The section turns on "may," the term is permissive only, and can never be construed as "must" in a statute, unless the construction is so essential to the operation of the statute that it must otherwise fall. That necessity does not exist as to this section. Hence, if it confers upon the law side of the district court chancery power it does not shift it from the chancery side.

Story's Eq. Juris., ninth ed., by Redfield, sec. 64 h: "There are also one or two rules as to the extent of maintaining jurisdiction which deserve notice in this place." Section 64 i: "One is that if originally the jurisdiction has properly attached in equity in any case on account of the supposed defect of remedy at law, that jurisdiction is not changed or obliterated by the courts of law now entertaining jurisdiction in such cases, where they formerly rejected it. This has been repeatedly asserted by courts of equity, and constitutes in some sort the pole-star of portions of its jurisdiction. The reason is that it cannot be left to courts of law to enlarge or to restrain the powers of courts of equity at their pleasure. The jurisdiction
96 of equity, like that of law, must be of a permanent and fixed character. There can be no ebb or flow of jurisdiction dependent upon external changes. Being once vested legitimately in the court, it must remain there until the Legislature shall abolish or limit it, for without some positive act the just inference is that the legislative pleasure is that the jurisdiction shall remain upon its old foundation. This doctrine has been a good deal canvassed in modern times, and it has been especially the subject of commentary by some of the greatest equity judges who have ever adorned the bench. Lord Eldon," in Kemp *v.* Pryor, 7 Vesey, 249–'50, "upon one occasion said: 'Upon what principle can it be said the ancient jurisdiction of this court is destroyed, because courts of law now, very properly, perhaps, exercise that jurisdiction which they did not exercise forty years ago? Demands have been frequently recovered in equity which now could be without difficulty recovered at law, etc. I cannot hold that the jurisdiction is gone merely because the courts of law have exercised an equitable jurisdiction.'"

SECTION 80. "The first consideration, then, is whether there is an adequate remedy at law, not merely whether there is some remedy at law; and here a most material distinction is to be attended to. In modern times courts of law frequently interfere and grant a remedy under circumstances in which it certainly would have been denied in earlier periods, and sometimes the Legislature, by express enactments, has conferred on courts of law the same remedial faculty which belongs to courts of equity. Now (as we have seen), in another case, if the court of equity originally obtained and exercised jurisdiction, is that jurisdiction overturned or impaired by this change of the authority at law in regard to legislative enact-
97 ments, for, unless there are prohibitory or restrictive words used, the uniform interpretation is that they confer concurrent and not exclusive remedial authority. And it would be still more difficult to maintain that a court of law by its own act could oust or repeal a jurisdiction already attached in equity."

13 Cal., 107, Smith *v.* Brannon.

California Practice Act, sec. 254. A precise repetition of our section 556—held to extend equity jurisdiction to law without taking it from equity.

12 Cal., 259, Curtis *v.* Sutter. Same construction given to section 254.

2 Nev., 209, Law *v.* Staples. Same statute in Nevada construed in same way.

III.

Treating section 556 as conferring equity jurisdiction upon the law side of the district court, and thus furnishing an adequate remedy at law, is no bar to the suit.

That an adequate remedy existed originally and only at law was a reason why chancery should not assume jurisdiction; but to suggest that its existing jurisdiction is taken away by a statute which, according to its terms and of itself, works an extension of that
98 jurisdiction is to reverse, not to apply the rule; to pervert a rule which was adopted only to limit the growth, never applied to reduce the existence of chancery powers.

J. C. BAIRD,
Solicitor for Appellants.
J. C. BAIRD,
WILLIAM WARE PECK,
Of Counsel.

99 EXHIBIT B.

In the Supreme Court of Wyoming Territory.

JOSEPH C. SPENCER and RALPH C. WEBSTER, Appellants,
vs.
SAMUEL McMASTER, Appellee.

Appeal from the district court of Laramie county.

Brief and argument of appellee.

Corlett & Rosendale, solicitors for appellee.

100 *Statement of Case.*

In the Supreme Court of Wyoming Territory.

JOSEPH C. SPENCER and RALPH C. WEBSTER, Appellants,
vs.
SAMUEL MCMASTER, Appellee.

Appeal from the district court of Laramie county.

Brief and argument of appellee.

Corlett & Rosendale, solicitors for appellee.

This was a suit in chancery, in which a demurrer to the bill of complaint was sustained and the bill dismissed. The appeal is taken from the decree sustaining the demurrer and dismissing the bill.

The bill of complaint in substance is as follows:

1. That the complainants are and at the dates mentioned in the bill were citizens of the United States.

2. That they are the owners in possession and lawfully entitled to the possession and ever since some time during 1877 they and their grantors have been the owners and in possession of certain placer mining claims or petroleum claims (describing same).

3. That said claims were located on the public domain of
101 the United States in full compliance with the laws thereof and with the laws of the Territory, in twenty-acre claims, in 1880 and 1881, by sundry parties whose names are given, each of whom, it is alleged, being then citizens of the United States, and having discovered at the dates of said location valuable deposits of mineral oil or petroleum; that the certificates of said locations were by them duly recorded in the office of the county clerk of Laramie county.

4. That since the location of said petroleum claims there have been expended by the complainants and their grantors more than one hundred dollars in each year, in labor and improvements, in the development of said claims.

5. That defendant claims some right, title, or interest adverse to the complainants in and to said petroleum claims by virtue of pretended locations of placer mining claims known, according to the survey thereof, as lot No. 37, for which the defendant, on December 30, 1881, applied to the U. S. land office at Cheyenne, Wyoming, for a patent from the United States, and wrongfully included in the application said petroleum claims, the property of complainants.

6. Defendant's said claim is without foundation in law or equity, as against complainants, and defendant has no estate, right, title, or interest in any part of said claims.

7. On February 24, 1882, and within sixty days of the first publication of defendant's notice of application for a patent, complainants duly filed in said land office adverse claims to said placer or petroleum claims, as wrongfully included in said application for a patent.

8. This action is brought in support of said adverse claims, and within the time prescribed by law, in order to determine the question of the right of possession to the land or claims in controversy, and in order to determine the interest claimed by the defendant.

9. That the defendant claiming to own said petroleum
102 claims and persisting in his said application for a patent, his acts and claims cast a cloud upon the right, title, and interest of the complainants and interfere with and embarrass them in their disposition and quiet enjoyment of said placer claims.

Upon the facts thus alleged the complainants prayed—

First. A decree that the complainants are the owners and entitled to the possession of said petroleum claims as against the defendant.

Second. That defendant be decreed to have no estate, right, title, or interest thereto, and that he be enjoined from further asserting or claiming any right to the said claims adverse to complainants, and for general relief.

To this bill the defendant in due season filed a demurrer, alleging as grounds thereof—

First. That no such case is stated by the bill as entitles the complainants in a court of equity to relief from or against the defendant touching any of the matters in the bill.

Second. That all said matters in the bill may be tried and determined at law.

Third. That the bill is not sufficiently verified.

This demurrer being sustained and the bill dismissed, the question is, Was such decree right?

Points.

I.

Assuming in this case that a court of equity might have jurisdiction to afford the relief asked for, for the sake of the argument, the first question submitted to the court is:

Does the bill in this case state any such case as entitles the complainants to the relief asked for or any relief? We hold that it does not. In the first place the bill does not contain the necessary allegations of matters of fact alleged in issuable form to show that the complainants have any such right or title in the premises as to entitle them to relief of any kind.

The bill alleges sundry locations of petroleum claims of
103 twenty acres each upon the public domain of the United States "in full compliance with laws thereof and those of the Territory." This allegation was intended to show the origin of complainants' rights in the premises. It therefore must be sufficiently explicit to show good right and title (of a possessory character) in the locators of the claims; but it is not sufficient to allege mere conclusions of law for the purpose of showing title in complainants. A location of a mining claim so as to give any rights must be made in a certain specified manner, and the bill should allege every fact distinctly and positively which is necessary to make a valid

location, so that, if necessary, the defendant can take issue as to such facts.

Story's Equity Pleadings, secs. 241 and 257.

Under the laws of the United States, whatever else may not be requisite to a valid location, the following requisites are indispensable: The location must be distinctly marked on the ground, so that its boundaries can be readily traced; there must be a description of the claim, such as will identify it; the names of the locators and the date of the location; a discovery within the limits of the claims located of the mineral deposit which gives it its character as land valuable for mineral, which discovery must be made before the location. Not less than one hundred dollars' worth of labor shall be performed or improvements made during each year on each claim.

Revised Statutes United States, sections 2320, 3324, 2329.

The bill in this case wholly fails to allege the necessary facts as to the location of the claims in question in proper form. It wholly fails to allege that the lands were valuable for minerals or
104 contained minerals or mineral deposits. The bill does not allege how or by what means the complainants derived title through or from the original locators. It does, in an insufficient form, undertake to allege that the several locators discovered at the dates of their locations valuable deposits of mineral oil, or petroleum, but wholly fails to allege that such discoveries were made within the limits of the respective claims located. The citizenship of the locators is not averred positively or in issuable form. Again, the bill alleges an expenditure by the orators and their grantors of "more than one hundred dollars in each year in labor and improvements in the development of said petroleum claims," but the bill does not allege, as it should, that such expenditure was made on each claim during each year.

Revised Statutes U. S., sec. 2324.

II.

We regard the foregoing considerations sufficient to dispose of this case, but there are other substantial reasons why the decision of the court below should be sustained, to which we now direct attention.

The only allegations in the bill which can by any possibility give a court of equity jurisdiction are—

1. That complainants are the owners and in possession of the petroleum claims.

2. That defendant's action in applying for a patent in the land office and persisting in making such application and in claiming some right, title, or interest in the claims adverse to complainants casts a cloud on complainants' title.

If these allegations do not make a case in equity, then there is no case stated in the bill, and it does not make a case giving jurisdiction in equity unless under the head of "bills of peace" or "bills to remove a cloud from title."

But a bill of peace can be maintained in only two cases:

105 1. Where the complainant has first established his title at law, or

2. Where the parties to the controversy are so numerous that a suit in equity is indispensable to comprehend them all, and to prevent a multiplicity of suits.

Adams' Equity, pp. 439, 440, 441.
Eldridge *vs.* Hill, 2 Johns. Ch. R., 281.
Morgan *v.* Smith, 11 Ills., 194.
Wiliard's Equity Jurisprudence, 323, 327.
Story's Equity Jurisprudence, secs. 852, 859.

Neither will the bill lie for the purpose of removing a cloud from the complainants' title, because neither party has any title to the premises in the sense in which the word title is employed in this connection. According to the bill, the parties are merely contending to obtain title. The defendant has applied for a patent, and an adverse claim having been filed against him the parties have been sent, pursuant to section No. 2326, Revised Statutes U. S., to the courts to have determined the single question of the "right of possession" of the respective parties to the land described. The defendant cannot obtain any title or proceed a single step in obtaining title until this court shall first determine the right of possession of said parties. The bill shows complainants to be now in possession, and alleges only that the defendant makes some claim of right thereto, and is attempting to get a patent from the United States through the proper channel. These facts do not make a case of a cloud upon title. It can hardly be said that the assertion of a claim or right to land made only in a lawful manner and in the channel prescribed by law would cast such a cloud upon title as to authorize a court of equity to give relief against such an assertion of right.

West *v.* Snebley, 54 Ills., 523.
Huntington *v.* Allen, 44 Miss., 654.
Low *v.* Staples, 2 Nev., 209.

106 It is only where the defendant is asserting a claim to property by virtue of some deed or instrument of writing which gives him some appearance of title and which he may use at some time to the injury of the complainant's rights and title that a bill will lie to remove a cloud from a title.

Story's Equity Jurisprudence, sections 700 and 700a, and notes to said sections where the cases are collected and the doctrines just stated are illustrated.

The bill prays for an injunction to restrain the defendant from further asserting or claiming any right to the premises.

But the defendant is not shown to be asserting or claiming any right except to have a patent, if he can here get a judgment in his favor as to the right of possession. He has a right to have a determination of the question of his right of possession by the court in a proper form of action; and if he gets a judgment in his favor, then

he has a right to ask for a patent thereon, which is all he does ask. The plaintiff cannot, therefore, have any apprehension of real injury, and so is not entitled to an injunction.

Hilliard on Injunctions, p. 9, sec. 14.

III.

This suit is unquestionably prosecuted pursuant to section 2326 of the Revised Statutes U. S. This appears from the nature of the allegations made in the bill herein, and the bill also expressly avers that it is brought pursuant to that section. By the section just mentioned it is provided that when a controversy arises in the land office between adverse claimants to mining ground, one of
107 whom is an applicant for a patent, it shall be the duty of the adverse claimant "to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession."

The nature of the proceeding is not prescribed, nor is the court named, except that it shall be "a court of competent jurisdiction;" but the subject-matter of the proceeding is expressly and clearly defined, and the authority given is only "to determine the question of the right of possession."

Manifestly the question as to whether or not the proceedings thus to be taken in a court of competent jurisdiction are to be taken in a court of law or in a court of equity is one to be settled by reference to the local law administered by the court having cognizance of the case, and not by the laws of the United States.

The question then resolves itself into this: Is the determination of the right of possession—the only question which is submitted by the United States law for decision—arising between these parties in this Territory one which a court of equity can determine?

By the law of this Territory "mines" and "mining property" are included in the terms "real estate" or "real property."

Comp. Laws Wyo., p. 120, sec. 654.

So by the law of the Territory the determination of the question of the adverse estate in the property in question alleged to be claimed by the defendant is to be by an action at law and not by a suit in chancery.

Comp. Laws Wyo., p. 110, sect. 556.
Richardson *v.* McNulty, 24 California, 339.
420 Mining Co. *v.* Bullion Mining Co., 9 Nevada, 240.

Under the section of the civil code just referred to the com-
108 plainant in this case has an adequate and complete remedy at law; hence there is no jurisdiction in chancery.

Moran *v.* Palmer, 13 Mich., 368–370.
Insurance Co. *v.* Bailey, 13 Wallace, 622.

Where legal and equitable remedies are given under separate systems of procedure there is no jurisdiction in equity in such a suit as this, where the sole question to be decided is, which party has the right of possession to a piece of land, such right of possession being

dependent wholly upon certain laws of the United States conferring rights of possession to mining lands upon parties upon complying with the provisions of those laws.

Grant *v.* Wheaton, 52 California, 430.
Golden Fleece Co. *v.* Cable, 12 Nevada, 312.
Eureka Con. M. Co. *v.* Richmond, 4 Sawyer, 312.
Hautz *v.* Gisborn, 1 Utah, 173.

It can avail nothing, therefore, in this case to discuss the question of the power of the court to remove the cloud from the title or to grant an injunction, for the act of Congress under which this case came to the court below, and by which the power of that court as to the judgment to be given was expressly defined and limited, does not refer any such question as the removal of the cloud from the title or the granting of an injunction. It would be a mere impertinence on the part of the court to decide any question except the one referred to it, and if it should decide anything further the law of Congress does not provide that any use shall be made of such further decision by the land department, to which the judgment is to be returned.

Any discussion, therefore, of the right of a court of equity
109 in a proper case to remove a cloud from title or to grant an injunction is irrelevant here, because no such questions have been referred to this court.

Independent of statute, a court of equity has no jurisdiction to determine a controversy between parties merely as to their respective rights to the possession of a tract of land.

Hibb *et als. v.* Babin *et als.*, 19 Howard, R. 271.

And the statute of this Territory has expressly provided that when one party is in possession of any real estate (and the mining claim is declared to be real estate by the code, sec. 654) and any person claims an adverse estate therein an action at law (not a suit in equity) may be brought to settle such controversy.

(See sec. 556 of the Code of Procedure as to law actions, Compiled Laws, p. 110.)

The question here presented would not arise in a State or Territory whose procedure blended law and chancery proceedings in a single form, because in that case if the bill or petition was insufficient it might be amended to make it sufficient, but in this Territory if a case is found to be on the equity side of the court when it ought to be on the law side of the court it cannot be so amended as to cure the defect or to transfer the cause to its proper jurisdiction. This has frequently been so decided in the trial courts of this Territory and it is the view enforced by the Supreme Court of the United States.

Thompson *v.* R. R. Company, 6 Wallace, 134.
Van Norden *v.* Morton, 9 Otto, 378.

Unless, therefore, this court holds that the mere determina-
110 tion of the right of the possession of the mining ground in question as between the parties hereto is a question of equi-

table cognizance, then the decree of the court below must be sustained.

IV.

It may be insisted by appellants that the right of possession to mining ground to be determined by the court by virtue of said section 2326 of the Revised Statutes of the United States is the right of possession as against the United States. If that were conceded it would by no means follow that such concession would affect the decision of this case. Clearly, however, the right of possession meant by said section last referred to was not a right of possession as against the Government, because no person, strictly speaking, has any right to any part of the public domain as against the United States until he first makes payment therefor.

Frisbie *vs.* Whitney, 9 Wallace, 187.

The bill in this case does not set out any deed, judgment, or other paper, evidence of title held by the defendant, and ask to have the same cancelled on the ground that such evidence of title is fraudulent or wrongfully in existence, and thus casts a cloud on complainants' title.

The cases heretofore relied on by the complainants to sustain the jurisdiction of the court below upon the question of the power of the court to remove cloud from the title will be found, upon examination, to be either actions brought under codes where equity and law procedure is blended or are cases where actions were brought to remove clouds from real titles to land, or were actions brought at law under provisions of codes in the precise terms of section 556 of the Code of Wyoming. In Story's Equity Jurisprudence
111 it is stated that when a person has a real title to land and another person has some deed, judgment, or decree, or some other paper evidence of title which is fraudulent or was wrongfully obtained, the court of equity may be asked to cancel such outstanding wrongful evidence of title. The bill here, however, makes no such case. It does not specify any such outstanding evidences of title.

Even if the bill did thus specify such an outstanding evidence of title in the defendant it could not avail here, for this case being brought under section 2326 of the Revised Statutes of the United States and for the purpose only of having the single question of the right of possession between the parties to the land in question determined as provided by that section, all other questions, save the single one thus referred to the court, are irrelevant. That section provides that after trial the judgment rendered in the action is to be filed in the land office to show the land office who has the right of possession, and not whether there are clouds on the title which the court will or will not remove.

For the foregoing reasons it is respectfully submitted that the decree of the court below should be affirmed.

CORLETT & ROSENDALE,
Solicitors for Appellee.

112 *Of Arguments.*

TERRITORY OF WYOMING, *ss:*

Rule 9. The counsel having the affirmative or the one who takes the appeal or writ of error shall be entitled to the opening and closing. In his opening he shall present all the authorities and points on which he relies; the counsel opposed shall then be heard and shall present all his authorities and his defense generally, and the counsel for the appeal, writ of error, or affirmative, as the case may be, shall conclude. The counsel on either side of the case shall not occupy in argument exceeding ninety minutes, except by leave of the court obtained before arguments are commenced.

Rule 12. No case will hereafter be heard until the appellant or the plaintiff in error shall deliver to the clerk fourteen printed copies of an abstract of so much of the record as is necessary for a full understanding of all the questions presented to this court for decision, of which copies six shall be for the court, two for the adverse party, two for the territorial library, two for the reporter, and two to remain with the clerk; said copies to be delivered to the clerk by the plaintiff in a writ of error within thirty days from the issuance of the writ, by the petitioner in error within thirty days after filing the petition, and by the appellant within seven months after filing the notice of appeal. The reasonable cost of the printing shall be taxed in favor of the prevailing party.

If the appellee or defendant in error shall deem the abstract of the appellant or plaintiff in error imperfect he may, within twenty days after the delivery of said copies to the clerk, deliver to the latter fourteen printed copies of such further or additional abstract as he shall deem necessary to a full understanding of the questions presented to this court for decision, to be distributed like the original fourteen copies; and if the court at the hearing shall deem the additional transcript of the record thus furnished necessary the court shall tax the cost of the same to the defendant in error or appellee, if he prevail. The printed transcripts required by this rule shall in all cases be paged, numbered, and indexed, the index in every case to refer specifically, by page and number of page, to everything that may be deemed material in the case to a proper understanding of such case.

The supreme court or any member of it may excuse a convict from observing the above requirements of this and rule 8 for printing briefs, on proof of his pecuniary inability to comply with them; the excuse by a member of the court to be by certificate filed with the clerk.

TERRITORY OF WYOMING, *ss:*

I, J. W. Bruner, clerk supreme court of said Territory, do hereby certify that the foregoing printed rules of our said court
113 were cut out of one of the printed pamphlets of the rules of the court and are identically the same as are used in practice in said Territory, and were in force in said supreme court at the commencement of the January term, 1884, and are now in force;

and I further certify that the foregoing briefs, hereto attached, marked Exhibits "A" and "B," of the appellants and appellee were filed, among others, in said court at and during the said January term, 1884.

Witness my hand and seal of said court this 15th day of October, A. D. 1884.

[Seal Supreme Court, Territory of Wyoming]

J. W. BRUNER,
Clerk Supreme Court Wyoming Territory.

114 TERRITORY OF WYOMING, *ss:*

I, John W. Lacey, chief justice of the supreme court of Wyoming Territory, do hereby certify that J. W. Bruner, whose name is subscribed to the foregoing certificate, is now, and was at the time of signing and sealing the same, the clerk of the said supreme court and the keeper of the records and seal thereof, and that said clerk was duly appointed and qualified to office as such clerk, and that full faith and credit are and of right ought to be given to all his official acts as such clerk in all courts of record in the United States and elsewhere; that his said certificate is in due form of law, and that his signature thereto subscribed is genuine.

Given under my hand this 15th day of August, A. D. 1884.

JOHN W. LACEY,
Chief Justice of the Supreme Court of Wyoming Territory.

Endorsed on cover: Wyoming Territory supreme court. No. 142. Joseph C. Spencer and Ralph C. Webster, appellants, *vs.* Samuel McMaster. Filed 21st October, 1884.